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# REPORTS

OF

CASES ARGUED AND DETERMINED

IN

## THE SUPREME COURT

2888 F

OF

THE STATE OF MISSOURI.

---

BY TRUMAN A. POST,

REPORTER.

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VOL. XLVI.

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ST. LOUIS:

M'KEE, FISHBACK AND COMPANY, PUBLISHERS.

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101

HON. DAVID WAGNER,	}	<i>Judges.</i>
HON. PHILEMON BLISS,		
HON. WARREN CURRIER,		
O. T. FISHBACK,* <i>Clerk at St. Louis.</i>		
N. C. BURCH, <i>Clerk at Jefferson City.</i>		
WILLIAM M. ALBIN,† <i>Clerk at St. Joseph.</i>		
TRUMAN A. POST, <i>Reporter.</i>		

\* At the March term of the Court, Francis Minor was appointed Clerk at St. Louis in place of O. T. Fishback, deceased.

† L. R. Lancaster was, at the February term, appointed in place of Albin.



## LIST OF CASES REPORTED.

---

### A

	PAGE
Abbott v. Lindenbower.....	291
Adams, Turner v.....	95
Ambs, Schafroth v.....	114
Albin, Ensworth v.....	450
Ambs, Schafroth v.....	580
Anderson v. Moberly.....	191
Andrew County v. Owens.....	386
Andrew County, Risley v.....	382
Angert, Atkinson v.....	515
Armstrong, State v.....	588
Atkinson v. Angert.....	515
Atkinson v. Stewart.....	510
Atwinger v. Fellner.....	276

### B

Babcock v. Babcock .....	243
Baldwin, Holt v.....	265
Barney v. White.....	187
Barrow v. Davis.....	394
Beattie, McCloon v.....	391
Beck's Administrator v. Beck, Executor of Beck.....	327
Beck's Executor, Beck's Administrator v.....	327
Bedford v. Hannibal and St. Joseph Railroad Company.....	456
Bell's Executor v. Hay.....	546
Bernecker, Miller v.....	194
Berthold, Administratrix of Sarpy, v. Berthold.....	557
Berthold, Sarpy's Administratrix v.....	557
Besshears v. Rowe.....	501
Biggs, Morgner v.....	65
Billion v. Walsh.....	492
Bishop, Phelps County v.....	68
Bishop v. Schneider.....	472
Bissell, The City of St. Louis v.....	157
Black, Carter v.....	384
Bleckman, Koeltz v.....	320
Boal, State ex rel. Kempf v.....	528
Boal, Administrator of Dugan, v. Morgner.....	48
Beehne v. Murphy.....	57

	PAGE
Boonville, Mayor, etc., of, v. Trigg.....	288
Bonnell, State v.....	395
Bornefeld, State ex rel., v. Rombauer.....	155
Brashears, Savoni v.....	345
Brashears v. Strock.....	221
Britton v. Dierker.....	591
Brockman, State v.....	566
Brooks, Newland v.....	574
Brown, Burch v.....	441
Bruner v. Wheaton.....	363
Bunce, Administrator of Beck, v. Beck, Executor of Beck.....	327
Bundy v. Hart.....	460
Busby v. Holthaus.....	161
Burch v. Brown.....	441
Burke v. Miller.....	258
Burke v. Seeley.....	334
Burnett, Prewitt v.....	372

## C

Caldwell v. Hawkins.....	263
Camp, Cohen v.....	179
Campbell, Workman v.....	305
Carr, Ryan v.....	483
Carson v. Hunter.....	467
Carter v. Black.....	384
Case v. Fogg.....	44
Cassidy, Hutchinson v.....	431
Clay County, State ex rel. White v.....	231
Coffey v. National Bank of State of Missouri.....	140
Cohen v. Camp.....	179
Coil v. Pitman's Administrator.....	51
Cole, Kenrick v.....	85
Coleman, State to use of, v. Willi.....	236
Collins v. Saunders.....	389
Coulter, State v.....	564
Copelin v. Phoenix Insurance Company.....	211
Cox v. Schroer.....	275
Crane, Stoker v.....	264

## D

● Davies County Savings Association, Harness v.....	357
Davies, Barrow v.....	394
Davis, Foster v.....	263
Davis v. Perry.....	449
Dehlinger, State to use of Kearney v.....	106
Dierker, Britton v.....	591
Dominic, Poe v.....	113
Douglass, Picot v.....	497
Dugan's Administrator v. Morgner.....	48

# LIST OF CASES REPORTED.

vii

## E

	PAGE
Ely, Hooper v.....	505
Enslin, Mutual Savings Institution v.....	200
Ensworth v. Albin.....	450
Ewing, Vasquez v.....	88

## F

Farrar, McManning v.....	376
Fellner, Atwinger v.....	276
Fisher v. Pacific Railroad Company.....	304
Fogg, Case v.....	44
Foster v. Davis.....	268
Fox v. Webster.....	181
Frederick v. Rice.....	21

## G

Garner v. Hudgins.....	399
Gaston v. White.....	486
Gatzweiler, Trustee of Mittalberger, v. Morgner.....	94
Gest, Tucker v.....	339
Gibson v. Pacific Railroad Company.....	163
Gleeson, Sheehan v.....	100
Grable, State v.....	350
Graham, State v.....	490
Graham v. United States Savings Institution.....	186
Grimes, Russell v.....	410
Grone, The City of St. Louis v.....	584

## H

Haegle v. Mallinckrodt.....	577
Haeussler v. McBride.....	25
Halladay, Johnson v.....	455
Hampton, Stevens v.....	404
Hanna, Patton, Executor, v.....	314
Hannibal and St. Joseph Railroad Company, Bedford v.....	456
Harness v. Davies County Savings Association.....	357
Harris v. Turner.....	438
Harrison v. Phillips.....	520
Hart, Bundy v.....	460
Harvey, Hewitt v.....	368
Harvey v. Sullens.....	147
Harvie v. Turner.....	444
Hatch, Palmer v.....	585
Hawkins, Caldwell v.....	263
Hay, Bell's Executor v.....	546
Hays v. Warren.....	189



	PAGE
Heinrich, Long v.....	603
Hertung, Tupper v.....	135
Hewitt v. Harvey.....	308
Hilderbrand, Woods v.....	284
Hoag, Tuttle v.....	88
Holt v. Baldwin.....	265
Holthaus, Busby v.....	161
Hooper v. Ely.....	505
How, Stillwell v.....	589
Hudgins, Garner v.....	399
Hume v. Wainscott.....	145
Hundley, State v.....	414
Hunter, Carson v.....	467
Hutchinson v. Cassidy.....	431

## J

Jamison, Executor of Bell, v. Hay.....	546
Jennings, Mead v.....	91
Johnson v. Halliday.....	455
Johnson, Pemberton v.....	342
Johnson v. Quarles.....	423
Johnson, Seaman v.....	111

## K

Kearney, State to use of, v. Deblinger.....	106
Kempf, State ex rel., v. Boal.....	528
Kenrick v. Cole.....	85
Kilpatrick, McCaul v.....	434
Kimm v. Weippert.....	582
Kinney, Richie v.....	298
Kirkham, Peers v.....	146
Klinger, State v.....	224
Knight, State ex rel. Webster v.....	88
Koeltz v. Bleckman.....	320

## L

Laies, State to use of, Schnerr v.....	108
Langner, Markle v.....	393
Laswell v. Presbyterian Church of Jefferson City.....	279
Lemon, State v.....	375
Lindenbower, Abbott v.....	291
Link, Spaunhorst v.....	197
Lockwood v. Sangamo Insurance Company.....	71
Long v. Heinrich.....	603

# LIST OF CASES REPORTED.

ix

## Mc

	PAGE
McBride, Haeussler v.....	25
McCaul v. Kilpatrick.....	434
McCloon v. Beattie.....	391
McClure v. Wells, Administratrix.....	311
McCoy, Woods v.....	297
McDonald, Southern Bank of Missouri v.....	81
McDonough v. Nicholson.....	35
McManning v. Farrar.....	376

## M

Mallinckrodt, Haegele v.....	577
Markle v. Langner.....	398
Mathews v. Switzler.....	301
Mead v. Jennings.....	91
Meeks, Pennington v.....	217
Messerly, Wood v.....	255
Meyer, Nedvidek v.....	600
Miller v. Bernecker.....	194
Miller, Burke v.....	258
Missouri Home Insurance Company, Schaeffer v.....	248
Missouri Valley Railroad Company, Tabor v.....	353
Milttenberger v. Morrison.....	251
Mitchell v. Peoples.....	203
Mittalberger's Trustee v. Morgner.....	94
Moberly, Anderson v.....	191
Moore, State ex rel., v. Sandusky.....	377
Morgner, Dugan's Administrator v.....	48
Morgner, Mittalberger's Trustee v.....	94
Morrison, Milttenberger v.....	251
Morgner v. Biggs.....	65
Murphy, Boehne v.....	57
Murphy v. Redmond.....	317
Murphy, State v.....	347
Murphy, State v.....	430
Mutual Savings Institution v. Enslin.....	200

## N

National Bank of the Metropolis v. Williams.....	17
National Bank of the State of Missouri, Coffey v.....	140
Nedvidek v. Meyer.....	600
Newland v. Brooks.....	574
Nicholson, McDonough v.....	35
Norman, State ex rel., v. Smith.....	60
North Missouri Railroad Company, Wilson v.....	36

## LIST OF CASES REPORTED.

## O

	PAGE
Oster v. Rabenau.....	595
Owens, Andrew County v.....	386

## P

Pacific Railroad Company, Fisher v.....	304
Pacific Railroad Company, Gibson v.....	163
Palmer v. Hatch.....	585
Patton v. Hanna.....	314
Peers v. Kirkham.....	146
Peoples, Mitchell v.....	203
Pemberton v. Johnson.....	342
Pennington v. Meeks.....	217
Perry, Davis v.....	449
Phelps v. Bishop.....	68
Phillips, Harrison v.....	520
Phillips v. Phillips.....	607
Phoenix Insurance Company, Copelin v.....	211
Picot v. Douglass.....	497
Pittman's Administrator, Coil v.....	51
Poe v. Dominic.....	113
Presbyterian Church of Jefferson City, Laswell v.....	279
Prewitt v. Burnett.....	372
Putnam v. Ross.....	387

## Q

Quarles, Johnson v.....	423
-------------------------	-----

## R

Rabenau, Oster v.....	595
Redmond, Murphy v.....	317
Reed v. Wangler.....	508
Reppy v. Reppy.....	571
Reppy, Slevin v.....	606
Rice, Frederick v.....	24
Risley v. Andrew County.....	382
Ritchie v. Kinney.....	298
Robinson, Rucker v.....	87
Rodman, Wilcox v.....	322
Rombauer, State ex rel. Bornefeld v.....	155
Ross, Putnam v.....	387
Rowe, Besshears v.....	501
Rucker v. Robinson.....	87
Russell v. Grimes.....	410
Ryan v. Carr.f.....	483

# LIST OF CASES REPORTED.

xi

## S

	PAGE
St. Louis, City of, v. Bissell.....	157
St. Louis, City of, v. Grone.....	574
St. Louis, City of, v. Siegrist.....	593
St. Louis, City of, St. Louis Gaslight Company v.....	121
St. Louis Gaslight Company v. The City of St. Louis.....	121
Salisbury, Wright v.....	26
Sandusky, State ex rel. Moore v.....	377
Sangamo Insurance Company, Lockwood v.....	71
Sarpy's Administrator v. Berthold.....	557
Saunders, Collins v.....	389
Savoni v. Brashear.....	345
Schaeffer v. Missouri Home Insurance Company.....	248
Schafroth v. Ambs.....	114
Schafroth v. Ambs.....	580
Schlieper, Steinberg's Trustee v.....	209
Schneider, Bishop v.....	472
Schnerr, State to use of, v. Laies.....	108
Schroeder v. Stock and Mutual Insurance Company.....	174
Schroer, Cox v.....	275
Scruggs v. Scruggs.....	272
Seaman v. Johnson.....	111
Secley, Burke v.....	334
Sheehan v. Gleeson.....	100
Siegrist, The City of St. Louis v.....	593
Slevin v. Reppy.....	606
Smith, State ex rel. Norman v.....	60
Southern Bank of Missouri v. McDonald.....	31
Spaunhorst v. Link.....	197
State v. Armstrong.....	588
State v. Bonnell.....	395
State v. Brockman.....	566
State v. Coulter.....	564
State v. Grable.....	350
State v. Graham.....	490
State v. Hundley.....	414
State v. Klinger.....	224
State v. Lemon.....	375
State v. Murphy.....	347
State v. Murphy.....	490
State v. Wolf.....	584
State ex rel. Bornefeld v. Rombauer.....	155
State ex rel. Kempf v. Boal.....	528
State ex rel. Moore v. Sandusky.....	377
State ex rel. Norman v. Smith.....	60
State ex rel. Treasurer State Lunatic Asylum v. State Auditor.....	326
State ex rel. Webster v. Knight.....	83

	PAGE
State ex rel. White v. Clay County.....	281
State, to use of Coleman, v. Willi.....	236
State, to use of Kearney, v. Dehlinger.....	106
State, to use of Schnerr, v. Laies.....	108
State Auditor, State ex rel. Treasurer State Lunatic Asylum v.....	326
State National Bank of St. Joseph v. Walser.....	348
Steinburg's Trustees v. Schlieper.....	209
Stephens, Woods v.....	555
Stevens v. Hampton.....	404
Stewart, Atkinson v.....	510
Stillwell v. How.....	589
Stock and Mutual Insurance Company, Schroeder v.....	174
Stoker, Administrator, v. Crane.....	264
Strock, Brasbears v.....	221
Sullens, Harvey v.....	147
Switzler, Mathews v.....	301

## T

Tabor v. Missouri Valley Railroad Company.....	353
Tennison v. Tennison.....	77
Ticknor v. Voorhies.....	110
Treasurer State Lunatic Asylum v. State Auditor.....	326
Trigg, Boonville v.....	288
Tucker v. Gest.....	339
Tuley's Administrator v. Wright's Administrator.....	239
Tupperry v. Hertung.....	135
Turner v. Adams.....	95
Turner, Harris v.....	438
Turner, Harvie v.....	444
Tuttle v. Hoag.....	88

## U

United States Savings Institution, Graham v.....	186
--	-----

## V

Vasquez v. Ewing.....	88
Vastine, Administrator of Wright, Tuley's Administrator v.....	239
Voorhies, Ticknor v.....	110

## W

Wainscott, Hume v.....	145
Walser, State National Bank of St. Joseph v.....	348
Walsh, Billion v.....	492
Wangler, Reed v.....	508
Warren, Hays v.....	189
Webster, Fox v.....	181

# LIST OF CASES REPORTED.

xiii

	PAGE
Webster, State ex rel., v. Knight.....	83
Weippert, Kimm v.....	582
Wells, Administrator, McClure v.....	311
Wheaton, Bruner v.....	363
White, Barney v.....	137
White, Gaston v.....	486
White, State ex rel., v. Clay County.....	231
Wilcox v. Rodman.....	322
Willi, State, to use of Coleman, v.....	236
Williams, National Bank of the Metropolis v.....	17
Wilson v. North Missouri Railroad Company.....	36
Wolff, State v.....	584
Wood v. Messerly.....	255
Wood v. Hilderbrand.....	284
Woods v. McCoy.....	297
Woods v. Stephens.....	555
Workman v. Campbell.....	305
Wright v. Salisbury.....	26
Wright's Adminstrator, Tuley's Administrator v.....	239

## Y

Youngblood, Administrator of Tuley, v. Vastine, Administrator of Wright, 239



# LIST OF CASES CITED FROM MISSOURI REPORTS.

A		PAGE
Abbott v. Lindenbower.....	145	
Alexander v. Hickox.....	286	
Allen v. King.....	485	
Allen v. Moss.....	481	
Anderson v. Moberly.....	450	
Atkinson v. Stewart.....	517	
Aubuchon v. Bender.....	482	
B		PAGE
Bailey v. Chapman.....	557	
Baker v. Schoenman.....	90	
Baker v. Stonebreaker.....	470	
Bateson v. Clark.....	390	
Bank of Missouri v. Wells.....	257	
Bauer v. Bauer.....	120, 365	
Beeler v. Cardwell.....	439, 447	
Bell v. Hoagland.....	29	
Bernecker v. Miller.....	194	
Berry v. Dryden.....	466	
Billion v. Larimore.....	496, 497	
Birch v. Benton.....	219, 220, 463, 466	
Bishop v. Schneider.....	485	
Blaisdell v. Steamer Wm. Pope...	273	
Bradley v. Bradley.....	441, 442	
Bray v. Thatcher.....	505	
Bredow v. Mut. Savings Institut'n,	201	
Bruns v. Crawford.....	509	
Bryan v. Miller.....	33	
Bryant v. Harding.....	33	
C		PAGE
Cadwallader v. Atchison.....	27	
Caldwell v. Head.....	408	
Callaway v. Nolley.....	495	
Campbell v. Wolf.....	309	
Carondelet v. Simon.....	496	
Carr v. Waldron.....	309	
Carr v. Youse.....	261, 262	
Carson v. Walker.....	488	
Chouteau v. Burlando.....	482	
City of St. Louis v. Oeters.....	296	
City of St. Louis, to use, etc., v. Bernoudy.....	106	
City of St. Louis, to use, etc., v. Clemens.....	105, 106, 579	
Clafin v. Van Wagoner.....	116, 537	
Clark v. Maguire.....	51	
Clayton v. Phipps.....	560	
Coates v. Robinson.....	116, 537, 544	
Coonce v. Munday.....	262	
Corby v. Rankin.....	408	
Coughlin v. Ryan.....	43, 119, 583	
Crawford v. Woodward.....	381	
Crump v. McMurtry.....	304	
Curry v. Collins.....	464	
D		PAGE
Davis v. Staples.....	262	
Deer v. State.....	608	
Dixon v. Desire's Administrator..	160	
Donnell v. Stephens.....	509	
Dorsey v. Watson.....	360	
Downing v. Still.....	29	
Dumey v. Schoeffler.....	113	
Dyer v. Carr's Executor.....	89	
Dyer v. Murdock.....	309	
E		PAGE
Eads v. Carondelet.....	366	
Edgell v. Sigerson.....	184	
F		PAGE
Farmers' Bank of Mo. v. Bayliss..	400	
Farrar v. Christy.....	381	
Fenn v. Dugdale.....	147	

## LIST OF CASES CITED FROM MISSOURI REPORTS.

xv

	PAGE
Field v. Oliver.....	30
Fine v. Gray.....	319
Fitch v. Pacific Railroad Co.....	458, 459
Fithian v. Monks.....	344
Franse v. Owen.....	262
Furnold v. Bank of the State of Missouri.....	524, 563

## G

Garvin's Adm'r v. Williams.....	151
George v. Tutt.....	28
Gillham v. Kerone.....	599
Guitar v. Gordon.....	554

## H

Hageman v. Moreland.....	113
Halsa v. Halsaa.....	482
Haven v. Foley.....	562
Hawkins v. State.....	567
Helm v. Wilson.....	557
Henderson v. Henderson.....	160
Hester v. State.....	567
Higgins v. Dellinger.....	401
Hopkins v. Dysart.....	319
How v. Dorsheimer.....	33
Howard v. Coshow.....	402

## I

In the matter of Duty's Estate.....	90
In the matter of Saline County Subscription.....	70

## J

Jaccard v. Davis.....	608
Johnson v. Dicken.....	463
Johnson v. Smith's Administrator	237
Jones v. Bragg.....	514

## K

Kennayde v. Pacific R.R. Co.....	356, 371
Kennett v. Plummer.....	287
King v. Lane.....	469
King's Administrator v. St. Louis Gaslight Company.....	439
Koch v. Lay.....	310
Krevet v. Meyer.....	439, 447

## L

	PAGE
Landis v. Perkins.....	488
Layton v. Riney.....	113
Lee v. Ashbrook.....	321
Little v. Mercer.....	557
Lowe v. Harrison.....	370, 371

## Mc

McCamant v. Patterson.....	241
McCormick v. Fitzsimmons.....	287
McCormick v. Fitzmorris.....	296
McCormick v. Kenyon.....	309
McCune v. Belt.....	528
McDermot v. Pacific Railroad Co.....	169
McDonald v. Gronefeld.....	32, 257
McDowell v. Cochrane.....	99
McGee v. Roberts.....	90
McWilliams v. Allan.....	599

## M

Marion County v. Phillips.....	70
Martin v. Michael.....	99
Matson v. Field.....	196
Merry v. Fremont.....	98, 99
Meyer v. Campbell.....	287
Mitchell v. Ladew.....	303
Mortland v. Holton.....	47
Murray v. Laften.....	262
Mut. Savings Institution v. Enslin	201
Myers v. Field.....	344

## N

Newman v. Hook.....	333
Nordmanser v. Hitchcock.....	28, 29
Northrup v. Cook.....	321
N. R. & P. Plank Road Co. v. Robinson.....	309

## P

Pacific Railroad Co. v. Seeley.....	310
Palmer v. Hunter.....	464
Patterson v. Camden.....	128
Paul v. Fulton.....	482
Pawley v. Vogel.....	573
Pipkin v. Allen.....	487

	PAGE		PAGE
Potter v. McDowell.....	573	State ex rel. Hequembourg v. Lawrence.....	531
Putnam v. Ross.....	598	State ex rel. Miller v. Daily.....	588
<b>R</b>		State to use, etc., v. Baldwin.....	392
Reed's Administrator v. Hansard..	196	Steiber v. Wenzel.....	278
Risher v. Roush.....	27, 29	Steigers v. Darby.....	28
Rohback v. Pacific Railroad Co....	169	Stephens v. The St. Louis National Bank.....	470
Ruby v. Hannibal and St. Joseph Railroad Company.....	262	Stevens v. Hampton.....	485
Ruggles v. Collier.....	105, 579	Stewart v. Severance.....	257
<b>S</b>		Stewart v. Stringer.....	273, 314
Sarpy's Adm'r v. Berthold.....	524	Stout v. Calver.....	28
Sayre v. Tompkins.....	395	<b>T</b>	
Schafroth v. Ambs.....	537, 582	Taylor v. Zepp.....	332
Schulter v. Bockwinkle.....	113	Taylor's Administrator v. Newby	237
Scott v. Bailey.....	410	Terrell v. Andrew County.....	407
Scruggs v. Scruggs.....	272, 314, 485	Ticknor v. Voorhies.....	608
Sheehan v. Gleeson.....	579	<b>V</b>	
Smith v. Benton.....	282	Valle's Heirs v. Fleming's Heirs..	568
Smith v. Hannibal and St. Joseph Railroad Company.....	459	<b>W</b>	
Snoddy v. Pettis County.....	89	Walker v. Mauro.....	605
Stanton v. Ryan.....	429	Waltham v. Warner.....	370, 371
State v. Bank of Missouri.....	433	Webster v. Blount.....	273
State v. Blackwell.....	237	West v. Best.....	204, 207, 208
State v. Cross.....	418	Whitehill v. Shickle.....	60, 412
State v. Davis.....	325	Whitesides v. Cannon, 43, 116, 366,	537, 544
State v. Hays.....	227	Wilson v. Brown's Adm'r.....	89, 90
State v. Hutting.....	417	Williams v. Harrison.....	219
State v. Klinger.....	226, 417	<b>Y</b>	
State v. McCoy.....	417	Yantis v. Burdett.....	28
State v. Marshall.....	390	Young v. Woolfolk.....	111
State v. Matthews.....	491, 492		
State v. Metzger.....	392		
State v. Newell.....	397		
State v. Starr.....	198		
State ex rel. Ensworth v. Albin....	451		

CASES  
ARGUED AND DETERMINED  
IN  
THE SUPREME COURT  
OF  
THE STATE OF MISSOURI.

MARCH TERM, 1870, AT ST. LOUIS.

[CONTINUED FROM VOL. XLV.]

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NATIONAL BANK OF THE METROPOLIS, Appellant, v. FRANK E.  
WILLIAMS, Respondent.

1. *Practice, civil—New trial, motion for—Sunday never included in computing number of days.*—Under our statute a service of fifteen days before term, excluding Sundays, is not necessary to bring a party into court; but it is the well-settled rule of common law that, as to matters to be transacted in court, Sunday is *non dies*, and should not be counted. In moving for new trial, or in arrest, a party should be entitled to four working days after trial if the term shall so long continue; and this rule is not annulled by the operation of the statute (Wagn. Stat. 888, § 6).
2. *Evidence—Draft—Testimony of bank cashier—Res gestæ.*—Where a draft sued on was held in bank by the cashier contrary to the usual mode of dealing with such paper, it is perfectly legitimate, as a part of the *res gestæ*, to give the declarations of the cashier concerning the paper, its object and character, and the relation of the drawer to him and the bank, so far as it throws light on the paper, while it was being so held.
3. *Bills and notes—Bank responsible for laches of cashier, when and how far.*—In a suit by a bank on a bill of exchange drawn by defendant in favor of plaintiff, through its cashier, where the proof showed that the bank received it as a bill of exchange, discounted it in the usual course of business, and presented it for acceptance in a reasonable time, the parties to it would be holden.

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National Bank of the Metropolis v. Williams.

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under the law merchant, notwithstanding a private contract of the cashier, outside the scope of his authority, with the drawer, by which the drawer was not to be charged. But plaintiff must look to the paper as a bill of exchange, and charge the parties to it under the law merchant; and where the proof showed that it was drawn to enable the cashier to receive the proceeds of cotton which was to be shipped in the name of the drawer to a drawee in Boston; that it was not entered upon the books of the bank as discounted paper, but kept and counted as cash; that it was so retained until the cotton adventure turned out a failure, when it was presented for acceptance and protested, plaintiff can not recover. In such case, in order to recover at all, plaintiff must treat the bill as its own property, and not that of its cashier, and, as owner, must be charged with the laches of its agents and officers.

*Appeal from St. Louis Circuit Court.*

*Dryden, Lindley & Dryden*, for appellant.

I. The four days required by the statute mean four judicial days. (Wash v. Randolph, 9 Mo. 142.) Sunday is not a judicial day. (Hale v. Owen, 2 Salk. 625; Rex v. Elkins, 4 Burr. 2130.) The common law on the subject is not changed by the statute (Wagn. Stat. 887-8, § 6).

II. The declarations of Hutchinson, by which the defendant sought to connect the draft sued on with the cotton speculations of Hutchinson and Williams, are mere hearsay, and incompetent evidence against the bank: first, because the cotton speculation was not within the scope of his agency or official duty; and second, the declarations did not occur at the time of, nor accompany the acquisition of, the draft by the bank, or by Hutchinson for the bank. (1 Greenl. Ev., § 113.)

III. The defendant rests his freedom from liability on the ground that he was but the agent of Hutchinson in drawing the bill sued on, and in the transactions out of which the bill grew, and that this was known to the bank at the time the bill came to its possession. The facts relied upon, if true, do not acquit the defendant of liability. An agent is personally liable in all cases where he makes the contract in his own name, or voluntarily incurs a personal responsibility express or implied, whether he is known to be an agent or not. (Sto. on Agency, § 269; Mayhew *et al.* v. Prince, 11 Mass. 54; Stackpole v. Arnold, *id.* 27;



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National Bank of the Metropolis v. Williams.

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Laforce v. Floyd, 5 Taunt. 749; Goupy v. Hardon, 7 Taunt. 159; Eaton v. Bell, 5 B. & A. 340.)

*Garesche & Mead*, for respondent.

I. Plaintiff's motion for a new trial not being made within four days, this court can not review the cause. (Wagn. Stat. 1059, § 6; Williams v. Circuit Court, 5 Mo. 254; Benoist v. Powell, 7 Mo. 224.)

II. Four days mean four judicial days but for the statute itself (Wagn. Stat. 887, § 6).

III. The transaction in this case was for the benefit of the bank, and its cashier's name was used as a cloak. The proof fully warrants this assertion.

IV. The declarations of Hutchinson were competent. (Merchants' Bank v. Berthold, 45 Mo. 527; 1 Greenl. Ev., §§ 113-14; Sto. on Agency, § 134.)

BLISS, Judge, delivered the opinion of the court.

Judgment was rendered in favor of the defendant on Saturday. The plaintiff presented his motion for a new trial and in arrest on the next Thursday, five days from the rendition of the judgment, instead of four, as seems to be required by the following provision of the statute: "All motions for new trials and in arrest of judgment shall be made within four days after the trial if the term shall so long continue; and if not, then before the end of the term." (Wagn. Stat. 1059, § 6.) If the four days are intended to mean four judicial days, then the motions were made in season, because in that case Sunday must be excluded.

Our statute provides that in computing time, the last day, if Sunday, shall be excluded (Wagn. Stat. 888, § 6), and this was held to be the law before its passage. (See cases cited in 2 Hill, 377, note *b*.) The defendant claims that upon the maxim *expressio unius*, etc., all other Sundays must be counted. But this does not follow. The statute only undertook to provide in regard to the first and last days of a statutory period, saying nothing concerning other days. If, then, there is any established rule, we are left to its guidance.



## National Bank of the Metropolis v. Williams.

By the common law this question was well settled. In *Hales v. Owen*, 2 Salk. 625, the court expressly held Sunday not to be included in the four days in which to move in arrest of judgment, and that the defendant was entitled to four judicial days. In *Rex v. Elkins*, 4 Burr. 2130, Lord Mansfield applied the rule to criminal cases, and held that in computing the time in which a party might move in arrest, Sunday was not to be counted. The Supreme Court of Massachusetts, in *Thayer v. Felt*, 4 Pick. 354, in construing a statutory provision that a sheriff might adjourn a sale three days, excluded Sunday, and made no distinction between a long period and one wherein the time limited is less than a week. Counsel had held that Sunday is *dies non juridicus* only in regard to things which are to be transacted in court; but the court did not so confine it, but held that the sheriff might adjourn three secular days although an intervening Sunday might make it four days in all. The Supreme Court of New York, in *Anon.*, 2 Hill, 375, held that the two days provided by statute for a certain proceeding in replevin meant two law days, and that Sunday should not be counted.

Defendant's counsel cite *Womack v. McAhren*, 9 Ind. 6, where the court held that service of process required to be made ten days before court was a good service, although the intervening Sundays were counted in making up the time; and they might have cited our universal practice in that respect, for it is never claimed that, under our statute, a service of fifteen days before term, excluding Sundays, is necessary in order to bring a party into court.

Without making the distinction of *Thayer v. Felt* between long and short terms, it is sufficient in this case to adopt the well-settled rule of the common law, that, as to matters to be transacted in court, Sunday is *non dies*, and should not be counted. In moving for a new trial, or in arrest, a party should be entitled to four working days after the trial if the term shall so long continue. The action was against the drawer of the following bill:

"\$30,000. WASHINGTON, D. C., May 14, 1866.

"At sight pay to the order of J. B. Hutchinson, cashier, thirty thousand dollars, value received, and charge the same to account of

"To J. W. SEAVER, Esq., Boston, Mass. F. E. WILLIAMS."

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National Bank of the Metropolis v. Williams.

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Hutchinson was plaintiff's cashier, and certain payments were indorsed on the bill. The defendant claimed that he, though the drawer, was not a party in interest to the bill, and that he was in no way indebted to the plaintiff, but that, in 1865, Hutchinson, who was plaintiff's cashier and general manager, employed him, with the knowledge of plaintiff, to go south to purchase and ship cotton; that Hutchinson advanced \$50,000 out of the funds of the bank, and defendant, as a matter of favor, and without consideration, executed without date a draft of \$50,000 upon a Boston firm, which was to be kept as a memorandum, and not to be presented until shipments of cotton had been made to meet it; that he went south, drew again for \$10,000, shipped cotton to the drawee, who advanced to plaintiff \$30,000, and the two drafts were surrendered upon defendant's giving the one sued on; that the last draft was made to Hutchinson, as plaintiff's agent, as a memorandum to enable plaintiff to receive the proceeds of other cotton to be shipped, which were afterward indorsed upon the draft. Defendant avers that all the cotton transactions were at the risk of plaintiff, and that he had no interest except an agreed compensation, and received no consideration for the draft. He also alleges that it was retained by plaintiff an unreasonable time without presentation.

The plaintiff claims that the court committed errors upon the trial in admitting improper testimony, and in refusing to make proper declarations of law. The testimony claimed to have been improperly admitted was given by one McElroy, the plaintiff's teller at the time of the transaction in question, and by one Root, who was employed to assist defendant, and it all pertained to the conduct and declarations of Hutchinson (who is now dead), to his relation to the bank and to defendant, and to the manner in which the draft was treated when it lay in the bank.

Plaintiff's petition shows that the bill was drawn on the 14th of May, 1866, and claims that it was drawn in favor of the bank by the name of Hutchinson, cashier, and delivered to him at once; also that it was not presented for acceptance until February following, and shows no reason for the delay. Testimony not objected to shows that the bill lay in the bank for many months,

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National Bank of the Metropolis v. Williams.

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and was counted as cash on hand, and was not treated as a discounted bill; and it was during the time it so lay that the declarations of Hutchinson were made which were called out. Now it does not matter whether this bill was the property of the bank or of Hutchinson, its cashier; it was held in the bank by him for some purpose contrary to the usual mode of dealing with such paper, and it seems to me to be perfectly legitimate, as part of the *res gestæ*, to give the declarations of Hutchinson concerning the paper, its object, character, and the relation of the drawer to him and the bank, so far as it throws light upon the paper, while it was so being held. (Greenl. Ev., §§ 113, 114.)

The instructions asked for the plaintiff were all correct, and should have been given, and the finding of the court should have been based upon them, if the bill had been treated and discounted as a bill and the proper steps had been taken with it. But it is undisputed that it lay in the bank for nearly nine months without being sent forward; that it was not treated as a discounted bill nor passed through the books, but treated as a cash item; that this was done by Hutchinson, the cashier and general manager, and must have been with the consent of the directors, who met monthly. The plaintiff claims that it should not be bound by Hutchinson's acts or contracts outside of the scope of his authority, and hence that any agreement he might have made with defendant that he was to pay nothing—that the draft was a mere matter of form, etc.—could not bind the bank. It might, perhaps, be well said that the cashier had no right to involve his bank in cotton speculations, and hence that it could not be bound by his contracts in that regard; and it might be further said that if he acted for himself in this speculation, and not for the bank, it would not be bound by any arrangement he might make with his agent Williams in relation to his liability upon the bill. If the bill was drawn by Williams, as is not disputed, and if the bank received it as such, discounted it in the usual course of business, and presented it for acceptance within a reasonable time, the parties to it would be holden under the law merchant, notwithstanding such private arrangement. But it was not so treated or presented. The testimony clearly establishes the facts that it was

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National Bank of the Metropolis v. Williams.

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drawn to enable the cashier to receive the proceeds of the cotton, which was to be shipped in the name of Williams to the drawee in Boston; that it was not entered upon the books as discounted paper, but kept and counted as cash; that it was so retained until the cotton adventure turned out a failure, when it was presented for acceptance and protested. The petition itself shows enough, to-wit: the date and place of drawing the bill, that it passed through no intermediate hands, and the long delay in its presentation without any reason or excuse for such delay.

An attempt is made to separate the acts of the plaintiff from those of its cashier, but if the bill was drawn in favor of Hutchinson personally, belonged to him, and was in his possession, the plaintiff has no interest, for no transfer from Hutchinson is shown; but if it was drawn in favor of the plaintiff, as alleged in the petition, and was its property, the plaintiff must be charged with the laches of its officers and agents. The failure of Hutchinson to present the bill was the failure of his bank.

The case was tried by the court. It matters little, with the undisputed and clearly established facts, what declarations of law were given or refused, and it is unnecessary to consider them in detail. The prosecution was vigorous, and the brief and arguments submitted to us are elaborate, but the facts are against the plaintiff.

The money we will suppose was improperly advanced by the cashier upon a speculation outside the legitimate business of the bank; whether with or without the express consent of the directors, does not appear. The defendant was a stranger to the institution, and no attempt is made to charge him except upon his bill. If the bank was a party to the arrangement by which he was not to be charged—by which the bill was taken as a memorandum of the amount advanced, and to enable it to reimburse itself out of the proceeds of the cotton—then the defendant should not be held. But if the bank, as such, made no such arrangement, it is not bound by those made by Hutchinson, but may look to the bill for reimbursement. It must, however, look to it as a bill, and must charge the parties to it as parties under the law; and if it has failed to take the necessary steps to charge

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 Frederick v. Rice & Stewart.
 

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the defendant as the drawer, the action can not be maintained. In either event the plaintiff must go out of court.

The judgment of the Circuit Court is affirmed. The other judges concur.

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**ADAM FREDERICK, Respondent, v. RICE & STEWART, Appellants.**

1. *Practice, civil — Continuances.* — The ruling of the court below upon motions for continuances is seldom interfered with by the Supreme Court, as it is a matter resting in their discretion; and in every case the ruling is entitled to every intendment in its favor.
2. *Practice, civil — Continuances — Rules of Circuit Court.* — The rule of the St. Louis Circuit Court, which requires the party applying for a continuance to state certain things in his affidavits, is founded in wisdom, and is necessary to prevent frivolous applications and ruinous delays.

*Appeal from St. Louis Circuit Court.*

**M. Kinealy**, for appellants.

When a continuance has been refused in the court below, without sufficient cause, and the party has been injured thereby, the judgment will be reversed by this court. (Tunstall v. Hamilton, 8 Mo. 502; Barnum v. Adams, 31 Mo. 532.)

**Stewart & Wieting**, for respondent.

The affidavit filed in support of this motion is clearly insufficient, because it does not comply with the rule of the Circuit Court governing such applications. The allowing of a motion for continuance rests largely with the discretion of the court hearing the same, and this discretion will not be interfered with unless it has been unsoundly exercised. (Carpenter v. Meyers, 32 Mo. 213; State, to use of Peters, v. Shreve, 39 Mo. 90; Freligh v. Ames, 31 Mo. 253; Freligh v. The State, 8 Mo. 606.) The ruling of the court in refusing to grant a motion for continuance, is entitled to every intendment in its favor. (King v. Pearce, 40 Mo. 222.)



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Haeussler v. McBride and Driscoll.

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WAGNER, Judge, delivered the opinion of the court.

Upon an examination of this record, we perceive but one question that is entitled to any consideration, and that is the action of the court in refusing to grant a continuance. It seems that the Circuit Court has a rule, which has been certified up as a part of this case, which requires the party applying for a continuance to state certain things in his affidavit. In the making of the affidavit this rule was not complied with.

The ruling of the lower courts upon motions for continuance is seldom interfered with, as it is a matter resting largely in their discretion; and in every case the ruling is entitled to every intendment in its favor. The rule established by the court, to govern in its practice, is founded in wisdom, and is necessary to prevent frivolous applications and ruinous delays.

This rule was before the appellants when they made their application, and if their cause for continuance was meritorious, it would have been an easy matter to have stated such facts as would have brought them within its terms. But they did not do so, and therefore they have no reason to complain.

Judgment affirmed. The other judges concur.

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HERMAN A. HAEUSSLER, Respondent, v. JAMES J. McBRIDE and  
PATRICK DRISCOLL, Appellants.

1. *Supreme Court — Failure to prosecute appeal — Judgment affirmed.*—When it appears from the transcript of the judgment and proceedings in the Circuit Court that appellant has failed to prosecute this appeal within the time prescribed by law, the judgment of the Circuit Court will, on motion, be affirmed.

*Appeal from St. Louis Circuit Court.*

*H. A. Haeussler, in propria persona.*

*Lackland, Martin & Lackland, for appellants.*



## Wright v. Salisbury.

BLISS, Judge, delivered the opinion of the court.

The respondent brings the transcript of the judgment and proceedings in the Circuit Court, and moves for an affirmance of the judgment.

It appears from the record that judgment was rendered against the defendants at the June term, 1869, of the Circuit Court of St. Louis county, which was affirmed at the October term in general term, from which defendant Driscoll appealed to this court.

Having failed prosecute his appeal, the judgment of the Circuit Court is affirmed. The other judges concur.

EDMUND WRIGHT, Appellant, v. THOMAS L. SALISBURY,  
Respondent.

1. *Practice, civil—Res adjudicata—Set-off in one suit, not considered, may be afterward made an independent cause of action.*—In a suit upon a note defendant's answer contained an equitable set-off; but at the trial defendant failed to appear, and the set-off was not considered. Defendant afterward brought his separate action for the set-off, but set forth no excuse—as fraud or mistake—for not having prosecuted his former set-off. *Held*, that his case must be treated as if no such defense had been attempted; and further, that the former suit would not be *res adjudicata*, so as to prevent defendant from bringing his separate action for the set-off. The former decision, in order to be a bar to an independent suit, must have been on the merits, and the matter set out must have been determined. If there were any doubt upon that point, it would be competent to prove by parol that the matters set up in the second petition had not been in fact submitted and passed on at the former trial.

*Appeal from St. Louis Circuit Court.*

Peacock & Cornwell, for appellant.

M. L. Gray, for respondent, cited Cadwallader v. Atchison, 1 Mo. 659; Risher v. Roush, 2 Mo. 95; Yantis v. Burdett, 3 Mo. 457; 15 Mo. 95; George v. Tutt, 36 Mo. 141; Adams' Eq. 196-7, note 1; Vastine v. Bast, 41 Mo. 493; 10 Mo. 100; 6 Mo. 254; 8 Mo. 679; 24 Mo. 40; Bosbyshell v. Summers *et al.*,

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Wright v. Salisbury.

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40 Mo. 172; Normanser v. Hitchcock, 40 Mo. 178, 181; 7 Mo. 6, 25; 8 Mo. 686; 10 Mo. 392; 11 Mo. 192; 13 Mo. 582; 18 Mo. 466; 27 Mo. 444.

BLISS, Judge, delivered the opinion of the court.

In 1858 the plaintiff gave West and Holton his promissory note for \$2,000, and, by sundry indorsements, it came through Jane West, wife of one of the payees, into the hands of the defendant, who recovered judgment upon it against the maker. The present action is brought to COMPEL AND SET OFF a claim against West, the husband, and to enjoin the collection of so much of the judgment, claiming that the note was prosecuted for his use; that it was fraudulently placed in the hands of said defendant to be collected in his own name, for the purpose of preventing the application of the set-off of some \$1,100, paid by the plaintiff upon an order of West, and by its terms agreed to be supplied upon said note, and also claiming other equities. The defense in part is *res adjudicata*, and upon that ground the Circuit Court dissolved the injunction and dismissed the petition.

It appears that when the original suit was brought upon the note, the facts embraced in this petition were set forth in the answer in order to constitute an equitable set-off to a portion of the claim; but, when the case was called for trial the defendant (present plaintiff) did not appear, his defense was not considered, and judgment was rendered upon the note. In giving the reason for his non-appearance, the present petition states that he relied entirely upon his attorney to look after the case, but that the attorney had, without his knowledge, left the State. Under these circumstances, has the plaintiff a right again to come into court and ask its protection? There is no *res adjudicata*. This equitable set-off has never been passed upon. But having had the opportunity of prosecuting it, and having actually set it out on paper, shall he now be permitted to prosecute it by petition?

This court has frequently held that equity will not interfere to grant a new trial, and let in a defense, where the failure to make it was the result of neglect by the party or his attorney. (*Cadwallader v. Atchison*, 1 Mo. 659; *Risher v. Roush*, 2 Mo. 95;

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Wright v. Salisbury.

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Yantis v. Burdett, 3 Mo. 457; George v. Tutt, 36 Mo. 141.) Nor is it error for the court to overrule a motion for a new trial on account of the absence of the attorney (Stout v. Calver, 6 Mo. 254; Steigers v. Darby, 8 Mo. 679; Normanser v. Hitchcock, 40 Mo. 178); though it might be supposed the court, in its discretion, would ordinarily grant the motion where the excuse for the absence was reasonable, and evident injustice had been the result.

The plaintiff not having set forth in his petition any excuse, as fraud or mistake, for not having prosecuted his set-off in the former suit, that would of itself entitle him to relief, we must treat his case as if no such defense had been attempted. In that case could the matter be prosecuted as an independent claim? If not, he has lost his day in court, and must suffer the penalty of his negligence, and it makes no difference whether the defense were a legal or equitable one. (Dederick v. Hoystradt, 4 How. Pr. 350; Hunt v. Farmers' L. & T. Co., 8 How. Pr. 416.)

I have said that this equitable set-off is not *res adjudicata*. Certainly the matter set forth had not been adjudicated in fact, but it is claimed that the general character of the judgment necessarily implies that it was passed upon; that the finding the issues for the plaintiff must have included all that were made by the pleadings. It certainly would include all that were prosecuted or involved in the prosecution. The record shows that this defendant (the present plaintiff) did not appear. His set-off was not then prosecuted, whatever the entry, for it could not be prosecuted. A set-off is an independent claim; a defendant may bring it in to extinguish, in part or the whole, the one upon which he is sued, or he may sue upon it independently. But however brought into court, it is an affirmative demand, that can not be investigated upon the merits unless prosecuted by him who makes it. The court does not sit to represent parties, but to hear their allegations and proofs; and if they fail to appear and present their demands, it can only dismiss them without adjudication. This is necessarily so, and I can not find that the contrary has ever been held.

The subject of former adjudication in relation to prosecutions

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Wright v. Salisbury.

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by plaintiffs, has often been before the courts, and it is always held that the court must have had jurisdiction; that the decision, to be a bar, must have been upon the merits, and the matter set out must have been determined. (See 1 Greenl. Ev., §§ 522, 530, and cases cited; also Bell v. Hoagland, 15 Mo. 360; Cow. & Hill's note 262 to Phillips' Ev.) And when a question is made as to the identity of the matters litigated in the first suit, parol evidence is admissible to explain the record. (Same note and cases cited.) And this court has held, in Normanser v. Hitchcock, 40 Mo. 178, and in Downing v. Still, 43 Mo. 321, that if the plaintiff fails to appear and prosecute his action, the court can not render judgment upon the merits, but must dismiss it. (See also Stephens on Plead. 109.) The same rule should hold in favor of an independent claim set up by a defendant if he fail to appear and prosecute it.

The court, in Risher v. Roush, 2 Mo. 97, though it was not the main point involved in the case, said: "If the party have any demand good by way of set-off, he must be driven to his separate action for remedy if he submitted no evidence on that point in a court of law."

Burrell v. Knight, 51 Barb. 267, was an action upon a warranty of a horse. It appeared that before the action was brought the plaintiff had been sued by the defendant for the price of the horse, and that he set up the breach of the warranty as a defense. He did not, however, appear at the trial, and judgment was rendered against him for the price upon the testimony of the plaintiff. After the trial, but before the justice had entered judgment, the defendant had withdrawn his defense. The Supreme Court, at general term, held that he was not precluded by the defense from bringing his action from the fact that he did not appear at the trial. "The defendant," says the court, "did not appear at the trial. The action was undefended. The only witness examined was the plaintiff, and it is not to be presumed he gave any testimony touching the defense. The defense, therefore, was never submitted to the justice. A withdrawal of the answer by the defendant's counsel was quite unnecessary."

The court cited numerous authorities in cases where adjudica-

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Wright v. Salisbury.

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tions were alleged to have been had upon claims submitted by plaintiffs, and made no distinction between them and the one then under consideration, and remarked further: "The authorities are that where the case is tried and the claim is submitted to the jury or the court, it can not in another action be litigated. The pleadings may present the claim, but if no testimony is given in support of it, and it is not submitted to the court or jury, it will not be barred unless it is a claim which the party is bound to present and litigate in that suit, as in some cases a set-off in a justice's court. And whether the claim was litigated and submitted is a question which may be proved upon the trial of the second action. \* \* \* If the record, as in this case, shows that the claim was not tried and submitted, no other proof is necessary."

The court, in the judgment now under consideration, found the issues for the plaintiff, and it affirmatively appears that the defendant was not present, and hence did not prosecute his claim. The inference must be that the court found only such issues for the plaintiff as it could lawfully consider, and that it found nothing upon the matters that were not submitted for its consideration; and if there were any doubt upon this point, it would be competent to prove by parol that the matters set up in the present petition were not in fact submitted and passed upon.

The petition alleges that West, to whom the plaintiff advanced the \$1,100, is the owner of the judgment, or most of it; that the note was transferred to Salisbury to enable West to cheat and defraud the plaintiff, and prevent him from setting off this advance; that West is insolvent, and is about to recover of the plaintiff the judgment he had obtained in the name of Salisbury while protected by his insolvency from his own indebtedness. It is a proper case for equitable interference. (*Field v. Oliver*, 43 Mo. 200.) The matter has not been adjudicated, nor was the plaintiff bound to set it up as a defense to the former suit.

The other judges concurring, the judgment is reversed and the cause remanded.



THE SOUTHERN BANK OF MISSOURI, Defendant in Error, v.  
McDONALD, Garnishee, Plaintiff in Error.

1. *Garnishment, judgment in — Judgment creditors — Motion to set aside judgment in garnishment by.* — After return day of an execution, plaintiff garnisheed a debtor of defendant. The garnishee appeared and answered the interrogatories, and judgment was obtained against him. *Held*, that the judgment was irregular, and should not have been entered; that the garnishee stood as though he had voluntarily appeared and answered interrogatories without notice, and that judgment creditors of defendant in execution, when he was shown to be insolvent and the judgment in the garnishment stood in the way of the collection of their claims, had such an interest in the suit against the garnishee as would authorize them to intervene by a motion to set aside the judgment on the garnishment.

*Error to St. Louis Circuit Court.*

*Lackland, Martin & Lackland*, for plaintiff in error, cited *McDonald v. Gronefeld*, 45 Mo. 28; *Bryant v. Harding*, 29 Mo. 347; *Bryan v. Miller*, 28 Mo. 32; *How v. Dorsheimer*, 31 Mo. 349.

*E. A. Lewis*, for defendant in error, cited *Martin v. Michael*, 23 Mo. 50; *Bentley v. Goodwin*, 38 Barb., N. Y., 633; *Melville v. Brown*, 1 Harrison, 363; *Brinkerhoff v. Brown*, 4 Johns. Ch. 671; *Hadden v. Spader*, 20 Johns. 555; *Perpet. Ins. Co. v. Cohen*, 9 Mo. 421, 441; *Smith v. Chapman*, 6 Porter, 365; *Betts v. Brown*, 5 Ala. 414; *Weimer v. Pritchett*, 16 Mo. 252; *Gates v. Kirby*, 13 Mo. 175; *Weil v. Tyler*, 38 Mo. 558; *Gen. Stat. 1865*, p. 671, § 19.

BLISS, Judge, delivered the opinion of the court.

The plaintiff obtained a judgment against defendant, Dennis McDonald, for some \$11,000; issued execution, and sold property to satisfy it in part, and, after the return day of the execution, garnisheed said James McDonald, and, upon his acknowledgment that he had money in his hands belonging to said Dennis McDonald, obtained judgment against him, as garnishee, for some \$2,900. Calloway and Robbins also obtained judgments against said Dennis McDonald, and appeared in court

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Southern Bank of Missouri v. McDonald.

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and opposed the rendition of the judgment against the garnishee, and afterward filed a motion to set it aside, upon the ground that the execution, having expired, was a nullity; but the court below upheld the execution, and held also that said Calloway and Robbins were outsiders, and had no such interest as would authorize their intervention. For this ruling the said Calloway and Robbins prosecute this writ of error. The record is complicated with many other proceedings that do not materially affect the question, and their history is unnecessary.

Since the decision in *McDonald v. Gronefeld*, 45 Mo. 28, it is not claimed that the extension of executions by the act of March 23, 1863, had any other effect than to extend the time in which land that had been levied on might be sold, and that it did not authorize a new levy after the ordinary time for the return; nor could it authorize a garnishment after such period. The judgment, then, against James McDonald, in garnishment, was irregular, and should not have been entered.

Had, then, Calloway and Robbins any such interest as to authorize them to thus interfere in the present suit and prevent the execution of this irregular judgment? They had each obtained judgments against Dennis McDonald, and served process of garnishment upon executions issued by them, and after its expiration, just as was done by the plaintiff. But perceiving the irregularity of this proceeding, they did not file interrogatories, but obtained a new execution, with a new service of garnishment upon said James McDonald, but could not obtain a judgment against him, for the reason that judgment had already been entered in favor of the bank. They then filed their motions to set aside the judgment, setting up its irregularity, also their own proceedings, and averring the insolvency of Dennis McDonald. Their motion was heard and granted, but the order granting it was set aside; the case was again docketed, and judgment again rendered against the garnishee.

The whole proceedings show that Calloway and Robbins, who make the motion and bring the record here by writ of error, are not only judgment creditors, but that their debtor is insolvent, and that the judgment upon garnishment, which they seek to set



aside, stands in the way of the collection of their claims. They have, then, a clear interest in the matter; and if they can not come in and thus seek to remove the obstacle in the way of collecting their debts, it must be because no one not a party to a proceeding can be allowed to present a motion in relation to such proceeding. But those who are not parties to the record are not always thus excluded. Counsel for the plaintiffs in error have cited us to several cases in our own court where motions have been sustained, presented by judgment creditors, to set aside, for irregularity, judgments rendered by confession in favor of other parties (*Bryant v. Harding*, 29 Mo. 347; *Bryan v. Miller*, 28 Mo. 32.) In *How v. Dorsheimer*, 31 Mo. 349, the particular motion was overruled; but the right, in a proper case, to present such motion was fully sustained.

If a judgment creditor has such an interest in the matter as to authorize a motion on his behalf to set aside a judgment in the way of the collection of his debt, I can see no reason why an irregular judgment upon garnishment, which operates in the same way against a creditor, may not also be removed upon his motion. Such motions are allowed in other States. (*Taylor v. Knox*, 1 Dal. 158; *Fairfield v. Baldwin*, 12 Pick. 388.) The practice in this respect is reviewed at some length in *Walker, etc., v. Roberts*, 4 Rich. S. C., 561, and the court says: "From the case cited it is shown that a junior attaching creditor may except to the illegality of a prior attachment, and, on motion, have granted an order to set it aside." (See also *Drake on Attach.*, § 275, and note to 3d ed.)

Counsel for defendant in error has referred us to many authorities to show that a creditor must establish his claim by judgment before he can ask the aid of the court. But I do not know that I fully understand the object of the reference. He must certainly have judgment, and also show that its collection will be endangered—as that the judgment debtor is insolvent—unless the relief is granted him. But if counsel means that he must show a judgment against the garnishee, it would be a strange requirement; for the impossibility in the present case of obtaining it so long as that of defendant in error is in the way, is the

very thing complained of. If the money in the garnishee's hands is all covered by the judgment in favor of the bank, no other judgment can certainly be rendered against him until that is set aside, and that is what the other judgment creditors asked the court below to do.

But the more difficult question is, whether the irregularity is such in itself as to injure subsequent creditors and give them a right to complain of it. It is well settled that "whatever irregularities may exist in the proceedings of an attaching creditor, other attaching creditors can not make themselves parties to those proceedings for the purpose of defeating them on that account." (Drake on Attach., §§ 262, 273, and cases cited.) Nor can the garnishee object to such irregularities if jurisdiction over the defendant and garnishee has attached, so as to protect the latter. (*Id.*, § 697.) But it is also as well settled that the equities of different attaching creditors are equal; that the rights acquired by them must depend upon their substantial compliance with the law, and that fraud, collusion, or any departure from its forms for the purpose of accelerating his remedy, or otherwise to give an undue advantage, will destroy his lien and let in other creditors. (*Id.*, § 262 *et seq.*, and cases cited.)

The proceeding at bar is not under the attachment act, but section 2 of the garnishment act provides that the service of garnishment and subsequent proceedings shall be the same as in the case of garnishment under attachment. The creditors who filed this motion do not seek to avail themselves of any irregularities, if any there be, in obtaining the judgment against the principal debtor, but claim that the garnishee was never brought into court, that there was no foundation for the judgment against him, that they first served upon him a lawful notice of garnishment, and are entitled to preference.

The garnishee, as we have seen, appeared and answered the interrogatories, supposing, perhaps, that the notice was regular. He might have declined to do so, and no valid judgment could have been rendered against him. Having done so, he, perhaps, may not be allowed to object to the irregularity of the service

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McDonough v. Nicholson.

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upon him, and, though it was not a leading point in the case, such I understand to be the ruling in *Smith v. Chapman*, 6 Porter, Ala., 365. But how is it with the other attaching creditors, the plaintiffs in error? Their equities were equal to those of the plaintiff, and if their right to this fund was inferior, it was because of the superior diligence of the party who first served the process of garnishment. But this process had no validity, and the garnishee stands as though he had voluntarily appeared and answered interrogatories without notice. As against other creditors who are entitled to the reward of their vigilance, he can not thus come in to give another a preference over them.

I am, then, clearly of opinion that the plaintiffs in error have a right to object to this voluntary appearance and the judgment founded upon it, and to ask to have it vacated. It was not a mere irregularity that could not have affected their rights, but, on the other hand, it cut them off from their equal right to pursue the fund under the law, and was "a substantial departure from the legal mode prescribed for enabling the party to obtain the benefit of his attachment." (Drake on Attach., § 262.)

The other judges concurring, the judgment of the Circuit Court overruling the motion of Calloway and Robbins will be reversed, and the cause remanded for further proceedings.

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PATRICK McDONOUGH, Respondent, v. DAVID NICHOLSON,  
Appellant.

*Practice, civil—New trial—Order of, not subject to appeal.*—An order granting a new trial can not be appealed from or made the subject of review in the appellate court; and this rule is not changed by section 1 of the act providing for the reorganization of the St. Louis Circuit Court. (Sess. Acts 1869, p. 16.) The "orders" referred to in that act are final orders, which dispose of a case and leave nothing further to be done.

*Appeal from St. Louis Circuit Court.*

W. H. Horner, for respondent.

Geo. P. Strong, for appellant.

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H. & O. Wilson v. North Missouri R.R.

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WAGNER, Judge, delivered the opinion of the court.

There is but one question in this record that need be noticed. Upon the rendition of a verdict by the jury in the trial in the Circuit Court, a motion for a new trial was filed by the plaintiff and sustained. The order granting a new trial is appealed from.

It has always been the settled law in this State that an order granting a new trial is a matter mainly resting in the discretion of the judge presiding at the trial. As it does not fully dispose of the case, but leaves it to be further proceeded with, it can not be appealed from or made the subject of review in the appellate court. But it is contended that this well-established rule has been changed by legislative enactment in the act amendatory to the act to provide for the reorganization of the St. Louis Circuit Court. That act declares that "at the general term the said Circuit Court shall hear and determine points of law reserved at special term, and all appeals taken from any final judgment or decree rendered, or order made, at special term," etc. (Sess. Acts 1869, p. 16, § 1.)

The law here speaks of final judgments and decrees rendered or orders made. It is obvious that reference is made to final orders which dispose of a case and leave nothing further to be done. It is not to be presumed that it was intended that an appeal should lie from the ruling on every motion in the trial of a cause. A fair interpretation of the language will bear no such construction. The practice here sought to be enforced would lead to the prolongation of trials at the Circuit Court, and multiply appeals indefinitely. In my judgment it is contrary to the clear meaning and intent of law.

Let the appeal be dismissed. The other judges concur.

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H. & O. WILSON, Appellants, v. NORTH MISSOURI RAILROAD  
COMPANY, Respondent.

1. *Practice, civil*—*Bill of exceptions*—*No point of law saved, finding will not be disturbed.*—A bill of exceptions showed that plaintiff excepted to the finding and judgment; but no instructions were asked or given. *Held*, that no point of law being saved, this court will not review or disturb the finding of facts.

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Rucker et al. v. Robinson et al.

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*Appeal from St. Louis Circuit Court.*

*T. Espy*, for appellants.

*Moss & Sherzer*, for respondent.

WAGNER, Judge, delivered the opinion of the court.

Plaintiff sued the defendant on account. At the trial in the court below, the cause was submitted to the court without a jury. Each party offered a single instruction, both of which were refused. The court then found and rendered judgment for the defendant. The bill of exceptions states, "to which finding and judgment of the court plaintiffs then and there excepted; no instructions asked or given by either party." As there is no point of law saved by the record, this court will not undertake to review or disturb the finding of facts.

Judgment affirmed. The other judges concur.

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JOHN M. RUCKER *et al.*, Respondents, *v.* JOHN M. ROBINSON  
*et al.*, Appellants.

1. Where appellant fails to file in the Supreme Court a statement and brief, judgment may be affirmed, with six per cent. damages.

*Appeal from St. Louis Circuit Court.*

*Napton and Lewis*, for respondents.

*Alexander, Broadhead, and Cline, and Lackland, Martin & Lackland*, for appellants.

WAGNER, Judge, delivered the opinion of the court.

In this case the appellants have failed to file any statement and brief, as required by the statute.

The judgment will therefore be affirmed, with six per cent. damages. The other judges concur.



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Vasquez et al. v. Ewing.—Tuttle et al. v. Hoag.

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LEWIS VASQUEZ *et al.*, Appellants, v. WILLIAM L. EWING,  
Respondent.

1. Vasquez v. Ewing, 42 Mo. 247, affirmed.

*Appeal from St. Louis Circuit Court.*

S. Simmons, for appellants.

Glover & Shepley, for respondent.

BLISS, Judge, delivered the opinion of the court.

This case has been twice in this court, and is reported in 24 Mo. 21, and in 42 Mo. 247. When the case was last here it was elaborately considered, and was tried in the Circuit Court upon principles then established. The plaintiff brings the record again before us and asks us to overrule that decision. This we can not do, and the judgment of the Circuit Court is affirmed. The other judges concur.

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E. G. TUTTLE *et al.*, Appellants, v. HENRY HOAG, Respondent.

1. *Husband and wife—Purchase of necessities, husband liable for on the ground of agency.*—Where the wife purchases necessities on credit, the law holds the husband liable on the ground of presumed or implied agency. But such contracts are held to be his, not hers.
2. *Married woman—Action against husband for goods sold wife—Husband not chargeable, when.*—In an action for goods sold and delivered to a married woman—it appearing in evidence that she was carrying on business in her own name; that plaintiff trusted her solely, and that the husband had no connection with the business, and in the absence of proof that he ever in any manner gave his consent to her management of the business—*held*, that the husband would not be chargeable for the debt.

*Appeal from St. Louis Circuit Court.*

Slayback & Haeussler, for appellants.

I. "If the wife trades in goods and buys for her trade, when she cohabits with her husband, his assent is to be presumed."



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Tuttle et al. v. Hoag.

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(Com. Dig., tit. Baron and Feme; Langfort v. Adm'r of Tyler, 1 Salk. 113; 3 Barn. & Cress. 638.) And it lies on the husband to show that the goods were furnished under such circumstances that he is not liable to pay for them. (Clifford v. Laton, 3 Car. & P. 15; 2 Bright Husb. Wife, 11, § 27.) The wife's contracts during cohabitation will bind the husband to a greater extent than for mere necessities if the evidence warrants the inference that a more extensive authority had in fact been given. (2 Bright Husb. Wife, 9, § 14; 2 Mo. 69; Deery v. Duchess Mazarine, 1 Salk. 116, note *a*; Reeves' Dom. Rel. 79, 80, note 2; Petty v. Anderson, 3 Bing. 173-4.)

II. The *femme* can in no case be sued upon a mere personal contract during coverture. (1 Chit. Pl. 58; 1 Taunt. 217; 4 Price, 48; 8 T. R. 545; 2 B. & P. 105; 3 Campb. 123; Com. Dig. Pl. 2, *a* 1; 2 T. R. 363; 2 Bright Husb. Wife, 297, 301, § 23.)

*Krum, Decker & Krum.* for respondent.

I. Even if the goods had been necessities, the husband would not have been liable, since the presumption of his assent to their purchase would have been overthrown by the fact that credit was given the wife. (Metcalf v. Shaw, 3 Campb. 22; Bentley v. Griffin, 5 Taunt. 356; Moses v. Fogartie, 2 Hill, S. C., 335; Sturtevant v. Starin, 19 Wis. 268; Shelton v. Pendleton, 18 Conn. 422; Galusha v. Hitchcock, 29 Barb. 193; Godfrey v. Brooks, 5 Harrington, 396; Connerat v. Goldsmith, 6 Ga. 14.)

II. The power of the wife to bind the husband is founded upon the sole ground of agency. (Sawyer v. Cutting *et al.*, 23 Verm. 486; Benjamin v. Benjamin, 15 Conn. 347; 18 Wis. 608; Taylor v. Shelton, 30 Conn. 122.) The husband is not liable unless he has given his assent. (Selw. Nisi Prius, 288.) The cases in which the husband has been held liable for goods supplied to his wife, doing business as a trader, all depend upon the fact that the husband exercised some control over the business or received its profits, or that the proceeds were appropriated to his support and that of his family. (Petty v. Anderson, 2 Car. & P. 38.)

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Tuttle et al. v. Hoag.

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WAGNER, Judge, delivered the opinion of the court.

This was an action upon an account which was tried in the St. Louis Circuit Court on an appeal from a justice of the peace. Before the justice judgment was obtained for the plaintiffs.

The following facts appear from the record: The goods sued for were sold and delivered to Mrs. Hoag, wife of the defendant, by the plaintiffs. Mrs. Hoag was carrying on business in her own name when she bought the goods. She went into business against her husband's consent. She and her husband were living together at the same house where the wife carried on the business. The husband received none of the proceeds of the wife's business; he had a separate business of his own, and defrayed the family expenses. The wife did not pay any of the family expenses out of the proceeds of these goods or out of the profits of the business. They were sold to her on credit; the account was opened in her name, and she made the payments which were credited on the account. The defendant never made any payments, and was never called upon to pay.

Upon these facts the court sitting to try the cause, without the intervention of a jury, was asked by the defendant to make the declaration that the plaintiffs could not recover. The court refused this declaration, and of its own motion declared as a proposition of law that if defendant, Hoag, was living with his wife at the time the bill in question was contracted, and if, with his knowledge and permission, she purchased the goods for the purpose of carrying on the millinery business in the house where he lived, then such purchase should be deemed to have been made with his consent, and that she acted as his agent. Judgment was then given for the plaintiffs, which was reversed at general term, and the case is now brought here for review by appeal.

It is evident, from the circumstances of this case, that the declaration which induced the finding and judgment should not have been given. The case is brought here and argued upon a wrong hypothesis. The authorities referred to and relied on by the counsel for the appellant do not sustain the position he has

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Tuttle et al. v. Hoag.

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assumed in this court. They mostly relate to cases where the wife has purchased necessities on credit, in which case the law presumes or implies an agency, or where an agency was proved as a matter of fact.

The husband is under a legal obligation to furnish the wife with what the law deems necessities, and whatever may be suitable and requisite to enable her to go according to her situation and degree in life; and if he is neglectful she may contract for such articles, and he will be held liable on the ground of presumed authority. Such contracts are his, not hers.

A wife, as such, has no original or inherent power to make any contracts which are obligatory or binding on her husband. No such right flows from the marital relations existing between them. To give her a power in any case to bind him by her contract made in his behalf, it must be by virtue of a power derived from him and founded on his assent, though such assent may be either precedent or subsequent, and express or implied; and this is the light in which such contracts are universally viewed. When such authority is conferred, it is not by reason of any relation existing between them as husband and wife, but it comes more properly within those principles which, in ordinary cases, govern principal and agent. That the wife has the capacity to be constituted by the husband his agent, and to act as such equally with any other person, has long been an established and undoubted principle.

Mr. Selwyn, in his work on *Nisi Prius*, states the rule with great clearness and precision in treating of the liability of the husband as to contracts made by the wife during coverture. After laying down the general doctrine that the relation of husband and wife is, in respect of the wife's contracts binding the husband, analogous to the relation of master and servant, he says: "Indeed, in contemplation of law the wife is the servant of the husband," and after citing a passage from Fitzherbert to sustain that position, he continues: "From this passage it appears that the husband is not liable for his wife's contracts unless he has given his authority or assent," and he then adds: "It is incumbent therefore, on a creditor who brings an action

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Tuttle et al. v. Hoag.

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against a husband, upon a contract made with his wife, to show that the husband has given such assent, or to lay before a jury such circumstances as will enable them to presume that such assent has been given; and, in the latter case, if such presumption is not rebutted by contrary evidence, the jury may find against the husband, but not otherwise, for the wife has not any power originally to charge the husband." (Selw. Nisi Prius, 288.) These principles are founded in reason, and are sustained by all the authorities.

The two strongest cases quoted by the appellants are *Petty v. Anderson*, 3 Bing. 170, and *Curtis v. Engel*, 2 Sandf. Ch. 287, but both are clearly distinguishable from the case at bar. In the former the husband was identified with the business carried on by the wife, assisted in it, and subsisted on the profits; when the bill was presented to him he did not disclaim or repudiate it, but advised the plaintiff not to go to law, as he might have to take a less amount. These facts Best, C. J., commented on in his charge to the jury, and gave it as his opinion that they might well infer an agency or assent from them.

In *Curtis v. Engel* the question was, whether the separate estate of a married woman was chargeable for a general debt incurred by her. The wife carried on the millinery business in her own name, the husband aiding and assisting her in the management; and upon the evidence the court simply held that the goods were furnished to both husband and wife, and that the husband was liable, and that the credit was not given on the separate estate of the wife. But the facts in the present case are wholly different. The husband here gave no assent; on the contrary, he dissented. He had nothing to do with the profits; he rendered no assistance in the management of the business, and was not connected with it in any manner.

The law is well settled that if a tradesman furnishes goods to a wife and gives the credit to her, the husband is not liable, though the wife lives with him, and he sees her in possession of the goods. (*Bentley v. Griffin*, 5 Taunt. 356.) In *Metcalf v. Shaw*, 3 Campb. 22, the defendant and his wife were living together. The goods were ordered by the wife alone, and she

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Tuttle et al. v. Hoag.

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gave her own note to the plaintiff for the amount of the purchase. The action was brought by the creditor against the husband for the price of the goods. Lord Ellenborough said: "The action clearly can not be maintained on the note, as the wife had no authority, general or special, from her husband, as his agent, to make it; and I think he is not liable for any part of the goods, on this plain ground: that they were not supplied on his credit, and the plaintiff looked to the wife alone for payment. The credit was given to the wife, and not to the husband." The cases are numerous affirming the same principle, and I am not aware of any authority asserting a contrary doctrine. (*Connerat v. Goldsmith*, 6 Ga. 14; *Moses v. Fogartie* 2, Hill, S. C., 335; *Benjamin v. Benjamin*, 15 Conn. 347; *Shelton v. Pendleton*, 18 Conn. 417; *Taylor v. Shelton*, 30 Conn. 122; *Sawyer v. Cutting*, 33 Verm. 486; *Carter v. Howard*, 39 Verm. 106.)

If a married woman makes a contract or incurs an obligation, and has separate property, equity would subject such estate to the payment thereof. (See the learned judgment of Leonard, J., in *Whitesides v. Cannon*, 23 Mo. 457.)

In a very recent case in this court it was held that when a husband permits a wife to carry on business on her sole and separate account, all that she earns will be deemed to be her separate property, and disposable by her as such, subject to the claims of third persons properly affected by it. (*Coughlin et al. v. Ryan*, 43 Mo. 99.) So, in Vermont, where a husband suffered his wife to set up the millinery business in her own name, and to manage it at her own discretion, he having nothing to do with making the purchases, keeping the accounts, or paying the debts of the business, and having furnished no capital for which he had not been repaid, and having had no communication with those of whom his wife made purchases, it was held that on equity principles the stock and property in the millinery shop should be treated as the separate property of the wife, and be held liable for her debts and subject to the demands affecting it. (*Partridge v. Stocker*, 36 Verm. 108.)

The plaintiffs having solely trusted the wife, and the husband



## Case v. Fogg

having had no connection with the business, and there being nothing to show that he ever in any manner gave his assent thereto, I am of the opinion that this attempt to charge him can not be sustained. The goods and the separate property of the wife might be reached by a proper proceeding in equity, but such a course has not been pursued.

The judgment will be affirmed; the other judges concurring.

ABBIE E. CASE, Respondent, v. JOSIAH FOGG, Appellant.

1. *Practice, civil — Bill of exceptions must specify rulings objected to.*—A bill of exceptions must clearly and distinctly advise the appellate court not only of the proceedings before the Circuit Court, but of each ruling of which the appellant complains, and that such ruling was excepted to at the time. Unless it shows such exceptions the bill is useless, and those errors only can be considered which are raised on the record proper by motion in arrest, if one be filed.
2. *Practice, civil — Pleadings — Defects cured by verdict under present system of pleading.*—A petition, while claiming specified damages for trover of certain goods, did not in the body of it state the value of the goods converted, but, after a general description, referred to an exhibit filed "for a more accurate description and the values." *Held*, that, under the increased liberality of our present system of pleading, the defect was cured by verdict.
3. *Lien — Innkeeper — Innkeeper can not sell without judicial process.*—An innkeeper has a lien on the baggage of his guests for the non-payment of their bills, but he has no power to enforce such lien by sale without judicial process.

*Appeal from St. Louis Circuit Court.*

Defendant asked the following instruction, which was given by the court: "The jury are instructed that if they believe that Fogg, Miles & Co. was a firm of innkeepers, of which defendant was one, keeping a public inn at the city of St. Louis, and that Nathan P. Case came there as a guest with his wife—the plaintiff—and their baggage, and that Case and wife ran up a bill which they refused to pay from any cause, the jury are instructed that the said innkeepers had a lien on their baggage and a right to detain but not to sell the same to secure said debt, unless they waived the same by contract or otherwise."



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Case v. Fogg.

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The following, among other instructions, were given by the court of its own motion: "The jury are instructed that the keeper of an inn or hotel has a lien on the baggage of his guests, but no right to enforce such lien by sale without proceedings at law; and although the jury may find from the evidence that there was no waiver of that lien by the defendant Fogg, yet if the jury find that the baggage seized was subsequently sold, and that defendant Fogg was a party to its conversion, or afterward ratified the same, they ought to find for plaintiff."

"The jury are instructed that, in general, one partner is not answerable for the trespass or wrongs committed by his co-partner, without his assent; and unless the jury find from the evidence that the goods in controversy were seized or sold with the assent of the defendant Fogg, or that defendant Fogg, knowing of such seizure and sale, subsequently ratified the same, or knowingly took the benefit arising from the proceeds of the sale, they should find for the defendant."

*Strong & Wise*, for appellant.

I. There is no cause of action stated in the petition. There is no value or allegation of value in the petition, no averment that the conversion was wrongful, illegal, unjust, or tortious. (*Bowling v. McFarland*, 38 Mo. 465; *Dietz & Walde v. Corwin et al.*, 35 Mo. 376.) Nor is such a defect cured by verdict. (*Frazer v. Roberts*, 32 Mo. 461; *Welch v. Ryan*, 28 Mo. 30.)

II. The firm, of which defendant was one, had a right to detain upon their lien as innkeepers, though they may not have had a right to sell. (32 Law Lib. 226, tit. Innkeepers; *Willard v. Reinhardt*, 2 E. D. Smith, 148; *Snead v. Watkins*, 1 C. B., N. S., 267; *Hursh v. Byers*, 29 Mo. 469.)

III. The bill of exceptions is sufficient. (3 Wall. 475.)

*Litton*, for respondent.

1. The conversion by sale was a partnership transaction. It was the act of the partnership for the benefit of the partnership. (*Lee v. McKay*, 3 Ired. 29; *Hadfield v. Jamison*, 2 Munf. 53; *Lindley on Part.* 231, 233, 235; *Pattee v. Gilmore*, 18 N. H.

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Case v. Fogg.

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460; *Townsend v. Bogart*, 11 Abb. Pr. 355; *Parsons on Part.* 153-6; *Parsons on Cont.* 157, note *j.*)

II. Taking additional independent security for a debt is a waiver of any lien for that debt. Fogg took such security and waived his lien.

III. The allegation of value is contained in the petition, and in the pleadings as made by the parties. No allegation of value is necessary. (*Pearpoint v. Henry*, 2 Washb. 192; 1 Hill. on Torts, 130, § 22.) If an allegation of value were necessary, the lack of it is cured by verdict. (*Carter v. Wallace*, 2 Texas, 206; 2 Hill. on Remedies, 235, § 21; *Farmer v. Richardson*, 36 Mo. 35; *Fry v. Baxter*, 10 Mo. 302; *Frost v. Pryor*, 7 Mo. 314; *Shaler v. Van Wormer*, 33 Mo. 386; *Connors v. Meier*, 2 E. D. Smith, N. Y., 314; *Smith v. Eastern R.R.*, 35 N. H. 357; *Hall v. Burgess*, 5 Gray, Mass., 12.)

IV. There are no exceptions preserved by the record either to the admission of evidence or the rulings of the court, or to the giving or refusal of instructions. The bill of exceptions nowhere states that the defendant "then and there excepted." And the only evidence in the bill of the dissatisfaction of the defendant at the admission of evidence or ruling of the court, or the giving or refusal of instructions, is that at the close of his bill defendant says: "To all of which defendant excepts." This is insufficient. (33 Mo. 149; 34 Mo. 141; 21 Mo. 122; 27 Mo. 415; 31 Mo. 530; 13 Mo. 511; 14 Mo. 367; *Duffield v. Cross*, 13 Ill. 699; *Johnson v. Bell*, 10 Ind. 363; *Andres v. Broughton*, 21 Ala. 200; *Sammins v. Johnson*, 22 Ala. 690; 4 E. D. Smith, N. Y., 251; 27 Barb. 512; 5 Seld. 170; 5 Duer, 240, 257; 43 N. H. 58; 9 Ind. 528; *Jenks v. State*, 17 Wise, 665; *Foster v. Nowlin*, 4 Mo. 18; *Hays v. Ellison*, 5 Mo. 110; *Reno v. Crane*, 2 Blackf. 218; *Rowan v. Dosh*, 4 Scam. 460; *White v. Gray*, 32 Mo. 467; *Searcy v. Devine*, 4 Mo. 626; *Brolaski v. Lamb*, 38 Mo. 51; 3 Gilm. 299.)

BLISS, Judge, delivered the opinion of the court.

The plaintiff brought her action in the nature of an action of trover for the conversion, by the firm of Fogg, Miles & Co., of

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Case v. Fogg.

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which defendant was a member, of a large quantity of ladies' wearing apparel, furs, jewelry, etc., and recovered a judgment for \$2,389. Counsel, in their briefs and argument, have considered at length the questions involved in the relation of the plaintiff, as wife, to her apparel and household stuff, etc., received from her parents, her paraphernalia, etc.; to her right to sue in her own name, and to the effect of a divorce, etc.; but, upon inspecting the record, I do not see how those questions can be considered by us. There is a bill of exceptions containing the evidence and the instructions to the jury given and refused, but I find no specific exceptions to any action of the court that bears upon these questions, and the general exception at the close of the bill is altogether too general to advise us as to its application. There is nothing technical in a bill of exceptions, but it must clearly and distinctly advise the appellate court not only of the proceedings before the trial court, but of each ruling of which the appellant complains, and that such ruling was excepted to at the time. A party will not be permitted to lie by and let errors accumulate without objection, and, if he is defeated upon the main issues, to take advantage of them afterward. Unless it shows such exceptions the bill is useless, and those errors only can be considered that are raised upon the record proper by the motion in arrest, if one be filed. (*Mortland v. Holton*, 44 Mo. 58, and other cases.)

The petition, while claiming damages in the sum of \$3,000, does not in the body of it state the value of the goods converted, but, after a general description, refers to an exhibit filed "for a more accurate description and the values." Under the increased liberality of our system, this defect should be held to be cured by verdict. The triers must have found the value of the goods as well as the fact of their conversion, in order to have given the verdict; their values were expressly denied by the answer as though formally averred; and by our statute, which in this respect makes no new provision, a judgment will not be disturbed for the reason that the pleadings omit "any allegation or averment, without proving which the triers of the issue ought not to have given such a verdict." The motion in arrest was therefore properly overruled.

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Boal, Adm'r of the estate of Dugan, v. Morgner.

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The evidence shows an aggravated case of a reckless and illegal attempt to enforce an innkeeper's lien by Mr. Miles, but with the knowledge and without the hindrance of the defendant.

A tenfold security for the husband's bill was demanded of the wife, and she was hardly permitted to take a change of clothing from her abundant stores. In a short time, without judicial process, large Saratoga trunks, loaded with rich goods when left, and of whose contents every one was ignorant except Mr. Miles, were put up at auction and sold for a song. It may be unfortunate for the defendant to be charged with the wrongful acts of his partner, but this proceeding concerned the business of the firm, and he not only did not interfere to prevent it, but participated in the proceeds of the sale. Though the technical questions have not been saved, that might have been raised upon the record, yet its inspection shows no want of fairness toward the defendant. The instructions upon the main point were quite as favorable to him as the law would warrant, and the judgment does but simple justice to the plaintiff.

The judgment is affirmed. The other judges concur.

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W. F. BOAL, ADMINISTRATOR OF THE ESTATE OF MARY T. DUGAN, Respondent, v. ALBIN MORGNER, Appellant.

1. *Husband and wife—Separate property of wife—Husband should be joined in suits concerning—Otherwise where property is simply that of wife.*—Where property is simply that of the wife, and not her separate property, whether conveyed to a trustee for her use or to her directly, the husband would have a marital interest, of which he could not be divested without his consent; and in suits pertaining to such property, he should be joined as a party. But her separate estate, on every rule governing it, must be considered as held by her, divested of any interest in the husband, and he need not be made a party to actions affecting it.
2. *Husband and wife—What words necessary to create an estate in the wife.*—No special or technical words are required to create in the wife a separate estate; but any provision that negatives or excludes the marital rights of the husband, while giving the property to the use of the wife, should be held to create in her a separate estate. Though the words "separate use" or "sole use" are usually employed, yet if the same intention is clearly expressed by other terms or provisions of the instrument, such words are not necessary.

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<sup>1</sup>Boal, Adm'r of the estate of Dugan, v. Morgner.

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3. *Practice, civil—Supreme Court—Penalty of ten per cent. damages applies to what cases.*—The penalty of ten per cent. damages awarded in the Supreme Court has been usually confined to appeals for delay merely from judgments on contracts—to collection cases; and that court is not inclined to extend it to suits for false and fraudulent representations unless special reasons appear.

*Appeal from Sixth District Court.*

*Lewis, Lackland & King*, for respondent.

*Dryden & Dryden*, and *Krum & Decker*, for appellant.

BLISS, Judge, delivered the opinion of the court.

The defendant conveyed to a trustee, for the use of plaintiff's intestate, by deed without covenants of seizure or warranty, certain real estate in the city of St. Charles, and for a full consideration received from her. After her death, her administrator prosecuted this suit against defendant for false and fraudulent representations in regard to his title, made to her at the time of the purchase, and charges him with representing that a certain judgment had been by him paid and satisfied, and was not in the way of his passing a good title by said deed, when in fact he had himself, upon execution upon the same judgment, bid off a portion of the same land, and caused it to be conveyed by the sheriff to a third person, and thus had created a better legal title through said judgment than that conveyed to Mrs. Dugan's use.

The petition shows that decedent paid the purchase money and received the deed, trusting to defendant's representation; that she, during her life, and her administrator since her death, had been subjected to large expenses to disencumber the title of said encumbrance, and asks for compensation in damages for the sums so expended. The plaintiff obtained judgment, which was affirmed in the District Court, and defendant brings the case here, claiming that there was error in refusing proper declarations of law, and in overruling the motion in arrest.

The defendant contends—and sought to raise the question by declarations of law and by his motion—that the plaintiff had no right to sue, inasmuch as his intestate was a *femme covert* at



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Beal, Adm'r of the estate of Dugan, v. Morgner.

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the time of the deception, and her husband is still living. But the deceptions pertained to and affected the title of her separate estate, and to make it as good as was represented, she and her administrator, and not her husband, were subjected to the expenses sought to be recovered back. Upon every rule that governs the separate estate of the wife, granting her its exclusive control, and subjecting it to her contracts and to hers alone, it must be considered as held by her divested of any interest in the husband. I can not, then, see upon what principle, in a suit pertaining to such estate, he should be required to prosecute; for parties in interest only are bound to sue. And besides, this action was brought while section 8, chapter 161, of the revision of 1865 was in force, and before it was changed in 1868, as incorporated in section 8, Wagn. Stat. 1001, and which expressly provided that when the action concerned the separate property of the wife she might sue alone. It might with more reason be claimed that the suit should have been brought by the trustee; but, as he could only bring it for the use of the estate of his *cestui que trust*, the objection, if it ever could have been raised, is but one of form, and is waived by not demurring. (Wagn. Stat. 1014-15, §§ 6, 10.)

It is claimed that an action for a wrong done the wife is a personal action, and that its subject-matter can not become a separate estate. This may be true in general, but an inspection of the petition shows that this suit is not brought for injury to her person, or to or in regard to any property or right in which the husband had an interest, but to recover back money expended by her and her administrator, to make good her title to her separate property. Suppose a trespass had been committed, or irreparable damage was about to be done to this property, who but the wife, if living, would be interested in the remedy? Or, if sued, whose estate would suffer?

I assume that this property was conveyed to the separate use of the wife, and not to her use merely. I do this from the fact that it was purchased with funds not furnished by the husband; and by the terms of the deed under which she received it, the power of disposition was vested in her without the husband — thus



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Coil v. Pitman's Adm'r.

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indicating an intention on her part to hold it divested of his control. No special or technical words are required, but any provision that negatives or excludes the marital rights of the husband, while giving the property to the use of the wife, should be held to create in her a separate estate. Though the words "separate use" or "sole use" are usually employed, yet if the same intention is clearly expressed by other terms or provisions of the instrument, such words are not necessary. (Clark v. Maguire, 16 Mo. 302; 2 Sto. Eq., § 1381; Hill. on Trust. 420.)

If this were simply the property of the wife, and not her separate property, whether conveyed to the trustee for her use or to her directly, the husband would have a marital interest of which he could not be divested without his consent; she could not even sell her interest but by joining with him. But in this case his interest is not recognized, and the fact that the wife and her trustee may convey the whole estate without him, plainly indicates that he had no marital rights, has nothing to convey himself, and has no power to control the conveyance of his wife.

This is the only question it is necessary to consider, and the judgment of the District Court will be affirmed.

Counsel asked for ten per cent. damages upon the judgment below. This penalty has been usually confined to appeals for delay merely from judgments upon contracts—to collection cases; and we are not inclined to extend it to actions of this kind unless special reasons appear. The other judges concur.

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JACOB COIL, Plaintiff in Error, v. IRWIN S. PITMAN'S ADMINISTRATOR, Defendant in Error.

1. *Administration—Will annexed, public administrator with, ordered to sell under will, can not be compelled to give deed by County Court.*—A public administrator, with the will annexed, was directed, under the will, to sell the real estate of the testator for a specified object not connected with the administration. Suit being brought in the County Court to compel him to execute a deed for the land to the purchaser, *held* as follows: 1st. County Courts exercising probate functions, although a branch of the State judiciary, have only such power and jurisdiction as are conferred on them by the statute.

- 2d. The act investing them with probate jurisdiction (1 Wagn. Stat. 440, § 7) does not clothe them with jurisdiction of such a proceeding. Where the authority of the administrator to sell is derived from the statute, he acts in obedience to the orders of the court, and is subject to its control, and the court possesses full supervisory power and jurisdiction in all matters touching the premises, as in compelling him to make a deed to the purchaser; but where a specific power to sell is conferred by will, and does not exist in consequence of any statute, the rule is otherwise, and the County Court can not entertain jurisdiction. The fact that the statute designates the administrator as the proper person to execute the power of sale, does not give it jurisdiction over the subject-matter. In the case cited relief should be sought in a court of chancery, and not in the County Court.
2. *Jurisdiction not given County Court by implication.*—Where the statute has not clearly devolved jurisdiction on the County Court, it can not be given by implication.

*Error to Sixth District Court.*

*E. A. Lewis*, for plaintiff in error.

I. The County Court had jurisdiction of the subject-matter of the petition. (Jones' Appeal, 3 Grant's Cas. 169; Dubois v. Sands, 43 Barb. 412; Seaman v. Duryea, 10 Barb. 523; Cleveland v. White, 31 Barb. 546.)

II. In the case now before the court, the defendant in error was not the person named or appointed by the testator to discharge the trust. He was not even the executor named in the will. He was appointed to discharge the trust solely by "operation of law:" first, in his appointment and qualification as administrator *cum testamento annexo*, with which the testator had nothing to do; and, secondly, by direct operation of the statute (1 Wagn. Stat. 93, § 1). An examination of the Pennsylvania statutes will show that in that State the authority of the Orphans' Court over the real estate of decedents is as specifically defined as in this. Yet it is there held that the authority to sell being first given by the testator, the duty of the administrator to carry out the authority is imposed upon him as a part of his office and by operation of law. The probate tribunal confers no authority upon him. It simply directs and controls him in the discharge of a duty, as it may well do, touching every duty of his office. (Dunlop, 541.)

*Henderson & Dyer*, for defendant in error.

I. The sale of lands by an executor under a will is a specific power conferred by the will, and not derived from the administration law.

II. Where lands are sold for the payment of debts (1 Wagn. Stat. 94, §§ 8, 21, 23, 24, 25), sundry specific requirements of the statute must be carried out. Not so in the case of a sale under a will. In this case there need be no appraisalment, no advertisement, no public auction during a term of court, no requirement as to the amount for which it shall sell, no denial of the right of executor to purchase except for a given sum, and no requirement that the executor shall report his proceedings to the Probate Court.

III. The administrator was a trustee for the heirs of Pitman, and alone responsible in a court of chancery for his conduct so far as this plaintiff is concerned.

IV. The statute enumerates the cases in which the court will order an administrator to convey real estate. (1 Wagn. Stat. 98, §§ 36, 37.) Its jurisdiction extends no further in this direction. (*Id.* 99, § 38 *et seq.*)

WAGNER, Judge, delivered the opinion of the court.

Pitman died in Warren county, Missouri, in 1862, leaving a last will, which was admitted to probate in that county. The will provided that, after the death of the testator's widow, the executor should sell the real estate and divide the proceeds among his children. The executor named in the will neglected to qualify, and Parker, the public administrator, took charge of the estate with the will annexed.

The widow having died in 1865, Parker advertised and sold the land; and the plaintiff in error, Coil, became the purchaser and made part payment, giving his note for the remainder. On the maturity of the note for the deferred payment, he alleges he tendered to Parker the amount due thereon, and that the latter refused to receive the money or to execute a deed for the land.

The plaintiff in error then filed a petition and made a motion in the County Court, asking for an order on Parker to compel him to execute a deed.

The motion being overruled by the County Court, plaintiff in error appealed the case to the Circuit Court of Warren county, whence it was removed by change of venue to the St. Charles County Circuit Court, in which court a motion to dismiss the proceeding for want of jurisdiction was made and sustained. The case was then appealed to the District Court, where the judgment of the Circuit Court was sustained.

The only question presented for consideration is whether the County Court of Warren county, as a court of probate, had jurisdiction over this proceeding. The County Court, exercising probate functions, although a branch of the State judiciary, has only such power and jurisdiction as is conferred on it by the statute.

That the administrator with the will annexed was the proper person to make the sale and execute the trust is undoubted; for the statute explicitly declares that the sale and conveyance of the real estate under a will shall be made by the acting executor or administrator with the will annexed, if no other person be appointed by the will for that purpose, or if such person fail or refuse to perform the trust. (Wagn. Stat. 93, § 1.)

The section investing the County Courts with jurisdiction provides that the several County Courts shall, when not otherwise provided by law, have exclusive, original jurisdiction in all cases relative to the probate of last wills and testaments, the granting letters testamentary and of administration, and repealing the same, appointing and displacing the guardians of orphans, minors, and persons of unsound mind, lunatics; in binding out apprentices, and in the settlement and allowance of accounts of executors, administrators, and guardians; to hear and determine all disputes and controversies whatever respecting wills, the right of executorship, administration, and guardianship, or respecting the duties or accounts of executors, administrators, or guardians, and all controversies and disputes between masters and their apprentices; to hear and determine all suits and other proceed-

ings instituted against executors or administrators, upon any demand against the estate of their testator or intestate, when said demand shall not exceed \$100, and concurrent jurisdiction with the Circuit Court in all such cases when the demand shall exceed that sum—subject to appeal, in all cases, to the Circuit Court, in such manner as may be provided by law. (1 Wagn. Stat. 440, § 7.)

It is evident that no authority can be derived for this proceeding from the foregoing section, for it speaks throughout of the duties of executors and administrators respecting the adjustment and allowance of demands against estates, the granting of letters, the probate of wills, disputes and controversies concerning wills, the right of executorship and administration. The present case does not fall within any of the grants of power by which a warrant to act is delegated to the County Court.

Where the executor or administrator sells real estate in obedience to the orders of the County Court, the statute points out the mode that he shall pursue. He must have the land appraised; he must advertise in a certain way before the sale takes place; the sale must be had at a certain time; the property must bring a certain amount, and there must be a report and approval to render it valid. (1 Wagn. Stat. ch. 2, art. 3.)

When the authority for the sale is thus derived from statutory provisions, the executor or administrator making the sale acts in obedience to the orders of the court, and he is subject to its control, and the court possesses full supervisory power and jurisdiction in all matters touching the premises.

But in the case we are now considering, the specific power to sell is conferred by the will, and does not exist in consequence of any statutory law. The administrator acted independently of the County Court. He was not amenable to it for the performance of any duty respecting the sale; and the manner, time, price, place, etc., were all matters resting in his sound discretion. He was not required to make any report or settlement with the County Court in reference to his action; in fact, the sale had nothing to do with anything relating to the administration. The will gave the power of attorney to sell for a specified object not



connected with anything touching the administration; and because the statute, in this instance, designated the administrator as the proper person to execute the power, it does not follow, therefore, that the County Court shall assume jurisdiction over the subject-matter.

The relief should be sought in a court of chancery. The counsel for the plaintiff in error has referred us to two cases as sustaining his position. The first case alluded to is in Jones' Appeal, 3 Grant's Cas. 169, and the reporter's head-note seems to bear out the doctrine contended for. It says: "Where a man directs by will that his executors shall sell his lands or perform any other trust created by his will, or when he creates a trust without saying who shall execute it, and appoints an executor, the execution is intrusted to him by operation of law, and the Orphans' Court alone has jurisdiction." But this adjudication was founded on the express provisions of a statute in Pennsylvania. In speaking on this subject, the court, in the opinion, say: "Now, although the 15th section of the act of 14th of June, 1836, relating to assignees and trustees, confers jurisdiction on the common pleas, in trust created by will as well as by deed, yet the proviso excepts such testamentary trusts as are vested in executors or administrators, who are by existing laws amenable to the Orphan's Court." It seems, therefore, that, by the proviso to the section on which the judgment was based, the Orphans' Court was invested with jurisdiction.

In *Dubois v. Sands*, 43 Barb. 412, the question arose as to the authority of the surrogate to compel executors to perform their duty, by expending for the benefit of infant legatees the interest of a sum of money intrusted to them for that purpose by the testator.

By the revised statutes, the surrogate was authorized to direct and control the conduct and settle the accounts of executors and administrators; to enforce the payment of debts and legacies, and to administer justice in all matters relating to the affairs of deceased persons, according to the provisions of the statute. It was held that under and by virtue of these enactments, there was ample authority to compel the executors to perform their duty by

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Boehne et al. v. Murphy.

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expending for the benefit of the testator's grandchildren the interest of the fund which had been intrusted in their hands for that purpose. "The authority," said the judge, "however, to do certain acts, or to exert a certain degree of power, need not be given in express words, but may be fairly inferred from the general language of the statute; or if it be necessary to accomplish its objects and to the just and useful exercise of the powers which are expressly given, it may be taken for granted."

There is nothing to be taken for granted here. There is nothing to carry out powers which are expressly given, or to accomplish just and useful purposes. This proceeding was instituted to compel specific performance, and a court of equity is much more appropriate to determine and grant relief in such a case than a County Court. Where the statute has not clearly devolved jurisdiction on the County Court, we are not disposed to give it by implication. Therefore, the judgment will be affirmed. The other judges concur.

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E. A. BOEHNE *et al.*, Respondents, *v.* ANDREW MURPHY,  
Appellant.

1. *Guaranty—Whether to be held continuing or otherwise—Construction, how determined.*—When it is doubtful, from the language contained in it, whether a guaranty was for a single dealing or a continuous one, the true principle of sound ethics is not to set up a presumption for or against the guarantor, but to give the contract the sense in which the person making the promise believed the other party to have accepted it, if he in fact did so accept it.
2. *Contract—Stamp, omission of—Intent.*—Where an order, as originally drawn, was without a revenue stamp, and no issue was made at the time of the trial in relation to the intent of the omission, an objection to the introduction of the order was properly overruled. (*Whitehill v. Shickle*, 43 Mo. 537, affirmed.)

*Appeal from St. Louis Circuit Court.*

*Garesche & Mead*, for appellant.

I. The instrument on which this suit is founded was improperly admitted in evidence, as the record shows that it was not

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Boehne et al. v. Murphy.

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stamped, as required by the internal revenue laws of the United States, when first offered, and the respondents have not proceeded in the manner required to make an unstamped instrument valid. (U. S. Stat. at Large, 481, §§ 152, 158.)

II. The instrument sued on was a guaranty only for the payment of the goods obtained on its first presentation. The liability of a surety is not to be extended by implication beyond the term of his contract. (Miller v. Stewart, 9 Wheat. 702; Fisher v. Cutter, 20 Mo. 206.) A guaranty will not be construed as a continuing one unless its language clearly indicates that such was the intention of the parties. (White v. Reed, 15 Conn. 457; Dixon v. Fraser, 1 E. D. Smith, 32; Fellows v. Prentiss, 3 Den. 512; Boyer v. Ewart, 1 Rice, 126; Whitney v. Groot, 24 Wend. 82.)

*J. J. McBride*, for respondents.

BLISS, Judge, delivered the opinion of the court.

The defendant gave to one Tully the following letter of credit addressed to plaintiff:

"ST. LOUIS, March 28, 1867.

"MESSRS. BOEHNE & GERKEN, City:

"GENTLEMEN: Please let Mr. P. Tully have the paints, oils, varnishes, glass, etc., he wants. I will be security for the amount for what he will owe you.

ANDREW MURPHY."

The plaintiffs let Tully have the goods from time to time, from the date of the order, for about six months, amounting in all to \$575, and Tully made various payments so as to reduce the amount due to \$145; to recover this balance the plaintiffs sue the guarantor.

The main controversy arises in regard to the construction of the guaranty, the action being based upon the assumption that it is a continuing one. The intention of the guarantor is certainly not very plain, and he now contends that he only designed to obtain a credit for a single purchase, in order to start a friend in business.

There seems to have been some difference among eminent judges in stating the principle that should govern the con-

struction of papers of this kind—Lord Ellenborough, in *Merle v. Wells*, 2 Campb. 413, holding that the words should be taken most strongly against the guarantor, and if he meant to be surety for a single dealing only, he should take care to say so; and Judge Story, in *Cremer v. Higginson*, 1 Mason, 323, saying that in a doubtful case the presumption should be against the construction that the guaranty is continuing. But I do not know that there is any special rule that applies to this class of writings, and Chancellor Kent (2 Com. 557) thus states the rule that should govern us in the construction of all contracts: "The modern and more reasonable practice is to give the language its just sense, and to search for the precise meaning, and one requisite to give due and fair effect to the contract, without adopting either the rule of a rigid or of an indulgent construction. \* \* \* The true principle of sound ethics is to give the contract the sense in which the person making the promise believed the other party to have accepted it, if he in fact did so understand and accept it." The Supreme Court of Connecticut, in *White v. Reed*, 15 Conn. 457, applied this rule of construction to a case of guaranty, and held that the words "for any sum that my son George may become indebted to you not exceeding \$200, I will hold myself accountable," did not imply a continuing guaranty.

Is there anything in the language of the present defendant, or in the circumstances in which the parties were placed, to indicate that the guarantor supposed that the guaranty was accepted as a continuing promise? But little light can be thrown upon the meaning by the numerous cases in the books, for the reason that in each case the intention of the parties is arrived at from the peculiar phraseology used and the object of the guaranty.

Tully was about to go into business, and was without cash or credit. The defendant knew him, and he was a relative of his family. "The paints, etc., he wants" constituted the stock he might from time to time need to carry on the business in which he was about to engage. Had all that was in the mind of the defendant been expressed, the order would have been something as follows: "My friend, P. Tully, is about to engage for the

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State ex rel. Norman, relator, v. Smith et al.

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coming season in the business of house painting, glazing, etc. Let him have the material he may want to carry on his business, and I will be security for any balance that may be found due you." This must have been the understanding, or we must suppose that the defendant meant to guarantee a purchase sufficient to stock a paint shop, or sufficient to complete any specific painting and glazing contract he might enter into. But painters, especially those without capital or credit of their own, are not in the habit of keeping a full stock of material on hand, but their custom is rather to purchase of the dealer, as they are called upon to use it. It is not reasonable to suppose that defendant intended that his friend should stock a paint shop at his expense, but rather that he intended to aid him in performing such jobs of work as he might from time to time obtain. The order specifies neither time nor amount, and the phrase "for what he will owe you" would more naturally imply a balance due at the end of the painting season, or when the defendant should put an end to the credit, than a balance of the first bill he might purchase.

The order, as originally drawn, was without a revenue stamp, and one was afterward placed upon it. No issue was made in relation to the intent of the omission, and the objection to the introduction of the order was properly overruled. (*Whitehill v. Shickle*, 43 Mo. 537, and cases cited.)

The other judges concurring, the judgment of the Circuit Court is affirmed.

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STATE *ex rel.* NORMAN, Relator, v. JOHN W. SMITH *et al.*,  
Respondents.

1. *County seat*—*Seat of justice must be within the limit originally selected.*—The seat of justice in a county is the place originally selected in pursuance of law, and can not be subsequently removed to a site within the extended town limits. An addition to a county seat is not the established seat of justice within the purview of the statute.  
Did such power of removal exist, the exercise of it by the County Court would be discretionary and its action final.



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State ex rel. Norman, relator, v. Smith et al.

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*Petition for mandamus.*

*Dryden, Lindley & Dryden, and A. D. Mathews, for relator.*

I. The County Court, after removing its sittings to the seat of justice, has no discretion that will permit it to hold elsewhere its sittings.

II. The town may be enlarged by additions without affecting the seat of justice. "The place selected by the commissioners" (Wagn. Stat. 396, § 8) "shall be the permanent seat of justice." How can the place selected be called the permanent seat of justice if it may be changed, as contended here, by the addition of a few lots to the town covering the seat of justice? What pretense is there for saying that railroad addition is the established seat of justice, within the meaning of the statute? (Wagn. Stat. 402, § 1.) The court, in holding its sessions beyond the limits of the established seat of justice, is acting in flagrant violation of the law, and should be required by this proceeding to return to the limits within which it may hold.

*Ewing & Holliday, for respondents.*

A seat of justice may or may not be incorporated; there is no law requiring this to be done. But if it should be, it may or may not include all or any part of the land acquired for this purpose, or the site of the court-house or other public buildings. The boundaries may be fixed, of course, without reference to any such considerations. It by no means follows, therefore, that because a court-house is not within the original donation, or within the corporate limits, it is not at the seat of justice or at the town of Lebanon. It is only by the name given to the town comprising the seat of justice, that the latter has any distinctive name or distinctive locality. The phrase "at the seat of justice," as used in the laws, has no signification different from its conventional sense or common acceptance—the same, for instance, in which we are to understand the provisions requiring certain officers to reside "at the seat of government."

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State ex rel. Norman, relator, v. Smith et al.

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WAGNER, Judge, delivered the opinion of the court.

This is an application for a writ of *mandamus* to compel the justices of the County Court of Laclede county to hold their sittings in the town of Lebanon, the original seat of justice for said county. The petition filed in the first instance conjoined the judge of the Circuit Court holding his court in that county, and also demanded that the County Court should be ordered to proceed to erect certain buildings, etc.; but that was subsequently withdrawn, leaving the proceedings solely against the County Court, as above stated.

It is wholly unnecessary, for the purposes of determining this case, to notice or examine the charges of corruption, combination, or sinister motives which have been made in the pleadings, or to particularly comment on the evidence which has been submitted, as the whole question simply turns upon the power of the County Court, and involves the legal construction of the statute only.

It seems that the county of Laclede was organized by an act of the general assembly of the State of Missouri, entitled "an act to organize the county of Laclede, approved February 24, 1849," and that, by the provision of the act, commissioners were appointed to locate the seat of justice; that the commissioners, in the discharge of their duties, selected as the seat of justice for said county the tracts or parcels of ground on which the original town of Lebanon was afterwards built. The commissioners received as a donation for said county seat fifty acres of land, and on the first day of October, 1849, made report of their proceedings, accompanied by the deeds and abstracts of title to the land, to the Circuit Court, which court approved the title to the lands, and caused its approval to be entered on the records, and certified to the tribunal transacting county business for the county.

It further appears that in November, 1849, the tribunal transacting county business appointed a commissioner of the seat of justice, and caused the tracts of land so selected as the seat of justice to be laid off in town lots and blocks, and that, in the sale, block numbered two in the tract so laid off was reserved for

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State, ex rel. Norman, relator, v. Smith et al.

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the purpose of erecting thereon the public buildings of the county; that block numbered two has ever since been known as the Public Square, and that in 1850 the County Court caused the court-house to be built thereon; that the court-house remained there till the summer of 1862 or 1863, when it was removed by order of the military authorities of the United States to a lot adjacent to and fronting on the Public Square, where it has ever since remained; that said court-house has been continuously used for the transaction of business connected with the court, from the year 1850 till about the 21st day of February, 1870, at which time, by order of the County Court, the clerk's offices were removed to what is known as the first railroad addition to the town of Lebanon, and subsequently the courts were ordered to be held, and actually were held, at the last-named place. This first railroad addition lies about three-fourths of a mile distant from the limits of the original town of Lebanon, and there is another addition which lies intermediate between it and the town.

The question is, had the County Court the legal right to make the removal, and order the sittings of the court to be held at a place different from the original town where the seat of justice was established?

The argument that the principal part of the business has left the old town and gone to the railroad addition, and that the sitting of the court there is conducive to the public interests, is of no consequence here. We can not be governed in our decision by any such consideration. If the power exists, the exercise of it by the County Court is discretionary, and its action is final. If, however, the court has no such power, and it has transcended the scope of its authentic jurisdiction, no question of expediency or convenience can justify its course or sustain its action.

The statutory provisions which were in operation when Laclede county was organized were not different from what has been imported into our present statutes. I shall, therefore, refer to the latter only.

The chapter in reference to the organization of counties provides for the commissioners or the seat of justice obtaining land, by purchase or donation, for the seat of justice, and requires the

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State ex rel. Norman, relator, v. Smith et al.

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donor or vendor to execute and deliver to the commissioners a deed conveying to the county the land so purchased or donated, in fee simple, without any reservation or condition whatever, and an abstract of the deeds, conveyances and assurances, through which such donor or vendor claims or derives title. The commissioners are then to make report of their proceedings, accompanied by such deeds and abstracts, to the Circuit Court of the county at its next term; and if the court approve the title, it shall cause its decision to be certified to the tribunal transacting county business, and the title of the land so conveyed vests in the county, and the place selected shall be the permanent seat of justice thereof. (Wagn. Stat. 395-6, §§ 6-8.)

By section 24 of the same chapter it is provided that, as soon as convenient buildings in which to hold the courts can be had, or a court-house and jail erected at the established seat of justice of any new county, the courts of such county shall be held at such seat of justice.

The record here declares the fact to be that buildings were erected at the original county seat, and had been in steady and constant use for about seventeen years.

Can it be said that the railroad addition to which the sittings of the court has been removed is the seat of justice, within the meaning of the law? It is true that an addition to a town for some purposes becomes a part of the town itself, and, when incorporated, the municipal regulations are generally extended alike to both. But there are some peculiar circumstances incident to the location of a seat of justice which are not applicable to subsequent additions. Where donations are made as inducements to any particular location, they are founded upon a supposed advantage that will accrue in favor of the place selected. Upon the idea that the county buildings will remain, and the location be permanent, people invest their money and acquire property; and to allow a court, without pursuing the course provided by law, to change the sessions to some other or rival location, would be a breach of faith and an act of injustice. It is very true, there is no permanent removal in this case; but if the place for holding the court can be changed temporarily in

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Morgner v. Biggs.

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the manner here attempted, it can be changed for an indefinite time, and all the evils complained of practically carried out. An addition to a county seat is not the established seat of justice within the purview of the statute.

By a recent amendment to its charter, the limits of the city of St. Louis have been extended so as to include Carondelet, several miles distant from the court-house. It will hardly be contended that, in pursuance of a discretion, the County Court of St. Louis county would have the power to remove the sessions of the court to Carondelet, should they think proper.

It is no answer to say that a better or more advantageous building can be procured in the new town or addition than is attainable in the original town, the county seat. It is the duty of the court to provide safe and suitable buildings for the convenience of the courts and the transaction of the public business. The statute invests them with ample authority for that purpose.

No valid or legal reason has been shown for the action of the County Court in this case, and I am, therefore, in favor of awarding the writ.

Peremptory writ ordered. The other judges concur.

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ALBIN MORGNER, Appellant, v. PETTIS BIGGS, Respondent.

1. *Replevin — Crops — Defendant's right to, under license of plaintiff.*—In replevin for certain wheat, where the answer, after traversing the issue presented, alleged title in defendant under one of plaintiff's tenants, who was claimed to have grown the wheat on plaintiff's premises, the *onus* would be on plaintiff to establish his title to the wheat, and to show its wrongful detention; and it would be competent for defendant to rebut and disprove the case, as made by plaintiff, by showing title in himself from the tenant, although the latter may have been the mere licensee, and not the lessee, of plaintiff.

*Appeal from Sixth District Court.*

*E. A. Lewis*, for appellant.

*Lackland and King*, for respondent.

This being an action of replevin for the recovery of specific personal property, the defendant is not bound to show a perfect



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Morgner v. Biggs.

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title in himself in order to defeat the action, but the plaintiff is bound to show a perfect title in himself in order to recover. Replevin will not lie in this case. The action will not lie for crops cut and removed by a disseizor. (Hill. Rem. Torts, 7, § 11; De Mot v. Hugermain, 8 Cow. 220; Powell v. Smith, 2 Watts, 126.)

CURRIER, Judge, delivered the opinion of the court.

This is a replevin suit. The petition avers that the plaintiff is the owner, and entitled to the possession of two hundred bushels of wheat, and that the defendant wrongfully detains it from him. The answer puts the averments in issue, and then alleges title in the defendant, tracing it from one Foster, who is alleged to have been the lessee and tenant of the plaintiff, and to have grown the wheat upon the premises.

Under the pleadings, the *onus* of proof was upon the plaintiff to establish his title to the wheat, and to show the wrongful detention of it by the defendant; and it was competent for the defendant to rebut and disprove the case, as made by the plaintiff, by showing title in himself from Foster, although Foster may have been the mere licensee, and not the lessee, of the plaintiff. (2 Greenl. Ev., §§ 561-2; 38 Mo. 160.) The case shows that the controversy turned upon the question of title to the wheat. It was claimed by both parties—by the plaintiff in virtue of his ownership of the soil on which the wheat was grown, and by the defendant through his purchase of it from Foster's estate. The plaintiff gave evidence of his title to the land whereon the wheat was grown, as tending to show his title to the wheat; and the defendant gave evidence tending to show that Foster was in possession of the premises for some two years, covering the period of the growing of the wheat, as the lessee or licensee of the plaintiff, and that the wheat crop was put in by him as such lessee or licensee, with the plaintiff's implied assent and approval; that Foster subsequently died, leaving his widow in possession of the premises; that his administratrix assumed control of the wheat, and sold and conveyed it to the defendant.

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Morgner v. Biggs.

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The evidence, however, failed to show the existence of the lease set out in the answer.

The questions presented for consideration here arise out of the action of the court in giving and refusing instructions. The answer alleged the existence of a lease from the plaintiff to Foster, and the plaintiff asked an instruction based on the theory that it was necessary to the success of the defense that it should be shown that the "crop of wheat was sown by authority of the plaintiff, under an actual lease of the premises." The instruction was properly refused. It ignored the evidence tending to show a license to Foster to cultivate the premises, and to take the crops to himself. There was evidence strongly tending to show such license, and it would have been erroneous to have excluded it from the consideration of the jury. It did not follow that Foster was an intruder and a trespasser, without any legal rights, from the mere fact that he had no actual lease. If he owned the wheat grown on the premises, that was sufficient for the purposes of the defense, although he had no lease.

The trial was by the court, and the court, of its own motion, gave a declaration of law to the effect that the finding should be for the defendant in case it appeared that he bought the wheat of Foster's administratrix, and that Foster occupied the premises and put in the crop as the plaintiff's licensee, acting therein with the knowledge and approbation of the plaintiff. There was evidence from which the supposed facts might well be inferred, and which warranted a verdict for the defendant, although no actual technical leasing of the premises from the plaintiff to the defendant was shown. The license was inferable from the facts and circumstances given in evidence. (2 Greenl. Ev., § 627.) The evidence so far was unexceptionable; but that part of it which was founded upon the supposed notice to the plaintiff of the administratrix's sale, in the form in which the matter was put, is subject to objection. It puts clauses in the disjunctive that ought to have been conjoined in sense and expression. It is not perceived, however, that the plaintiff was prejudiced thereby. The real point in contest was as to the actual title and ownership of the wheat. The instructions taken together, as they bore upon

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Phelps County, petitioner, v. Bishop.

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that inquiry, were not unfavorable to the plaintiff; and we are inclined to think that, upon the whole, the judgment should be affirmed. The other judges concur.

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PHELPS COUNTY, Petitioner, v. EDWARD W. BISHOP, Respondent.

1. *Certiorari*—Entry of allowance or rejection of claim by County Court not reviewable on *certiorari*.—The auditing of a demand against the county by a County Court is not a judicial proceeding, and the entry of its allowance or rejection is not a judgment; and, not being a judgment, can not be reviewed in an appellate court on *certiorari*. If a specific claim be rejected, the county may be sued upon it, and its rejection is no *res adjudicata*.
2. *County Court should not allow claims not warranted by law*.—County Courts have no right to allow claims not warranted by law.

*Certiorari to the County Court.*

W. J. Pomeroy, and Ewing & Holliday, for petitioner.

An appeal from the judgment of the County Court does not lie. (Gen. Stat. 1865, pp. 230-31, § 36; R. C. 1855, p. 528, § 9; Whitehead v. Stoddard County, 29 Mo. 138.) The only remedy is the writ of *certiorari*. (Const. Mo., art. 6, § 3; Thomas v. Mead *et al.*, 36 Mo. 233, 246-50; State *ex rel.* Thompson v. Saline County Court, 45 Mo. 52.) This writ may be awarded to all inferior tribunals and jurisdictions wherever it is shown either that they have exceeded the limits of their jurisdiction, or in cases where they have proceeded illegally, and no appeal is allowed, and no other mode of directly reviewing their proceedings is provided. (The People v. Wilkinson, 13 Ill. 660; Co. Litt. 288; 2 Salk. 504; 2 Caines, 182; Stone *et al.* v. The Mayor and Aldermen, 25 Wend. 157, 167, 169-71; N. J. R.R. & Tr. Co. v. Suydam, 2 Harrison, 25; 4 Ired. 155.) *Certiorari* is the appropriate remedy where the proceedings of the inferior court are not according to the course of the common law, and there must have been what is equivalent to a final order or judgment before the writ can be issued. (Ewing v. Hollister, 7 Ohio, 138.)

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Phelps County, petitioner, v. Bishop.

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*T. C. Fletcher, T. Polk and S. G. Kitchen*, for respondent.

I. *Certiorari* can not be used at common law to bring up a case from an inferior to a superior tribunal, after trial and judgment. (*Boren v. Welty*, 4 Mo. 251; 1 Tidd's Pr. 330, ch. 17.) There is no statute law authorizing the writ.

II. The statute expressly authorizes the County Court "to audit and settle all demands against the county." (Gen. Stat. 1865, p. 556, § 9.) The judgment of the County Court on all questions of fact is therefore conclusive, and can not be reversed or set aside by this court on *certiorari*. (1 Bouv. Law Dic. 231; *State et al. v. Trustees of Rochester*, 6 Wend. 564; 10 Pick. 358; 4 Hals. 209; 13 Ill. 660.) If it appear from the record in this case that the Phelps County Court has kept within the limits of its jurisdiction, this court can not go into the inquiry upon *certiorari* whether the County Court committed error in any matter of which it had jurisdiction. (*Groenwelt v. Burwell*, 1 Salk. 144; 1 Tidd's Pr. 334; 2 Tidd's Pr. 691.) And this being a subject-matter and a case over which the County Court had jurisdiction, this court will not upon *certiorari* inquire into the correctness of its rulings in it. (*Hann. & St. Jo. R.R. v. Morton*, 27 Mo. 320; *St. Louis County v. Lind and Clemens*, 42 Mo. 348; 13 Mo. 421; *Wood et al. v. Phelps County*, 28 Mo. 123; *Tetherow v. Grundv County*, 9 Mo. 118-20.)

BLISS, Judge, delivered the opinion of the court.

From the petition and return to the writ of *certiorari* it appears that the defendant, Bishop, presented a claim to the County Court for compensation for certain lands that he claims should have been conveyed to him in arranging the location of the county seat. The matter was prosecuted precisely as though the county had been sued in the Circuit Court, except, inasmuch as the County Court itself represented the county, there was no service of process. But there was a petition, answer, motion to strike out an insufficient allegation, and a regular judgment. With the return of the writ and proceedings comes a certified copy of an order of the court stating that the matter is prosecuted

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Phelps County, petitioner, v. Bishop.

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without its consent or authority, and requesting the attorney-general to appear and dismiss it.

So we have before us a proceeding brought up by *certiorari*, in the name of the county, to review the action of the only persons who can represent the county, and prosecuted here against their will. A writ of *certiorari* is directed to an inferior court or tribunal whose proceedings are not according to the course of the common law, but the action to be reviewed must be judicial in its character. (In the matter of Saline County Subscription, etc., 45 Mo. 52.) The auditing of a demand against the county by the County Court is not a judicial proceeding, and the entry of its allowance or rejection is not a judgment. The county judges are the agents, the representatives, of the county, and it is their duty to audit and pay all just and lawful claims against it; and, in performing that duty, they act precisely as would the agents of a private corporation. For that purpose they do not constitute a court in its proper sense, and the entry upon the record of their proceedings is not a judicial record. If a specific claim be rejected, the county may be sued upon it, and its rejection is no *res adjudicata*. This matter is incidentally considered in *Marion County v. Phillips*, 45 Mo. 75, as well as in the "Saline County Subscription," and we have no reason to change the conclusion there arrived at.

Much of the argument of counsel was devoted to the propriety of the action complained of in allowing the claim of Bishop. It does not become necessary to give any opinion upon that subject, but perhaps we should say that the County Court has no right to allow any claims not warranted by law. It should rigidly guard the treasury, and should not order the payment of money upon any notions its members may have of what may be fair and just, or what may subserve the public interests. If the judges abuse the trust reposed in them, the tax-payers of the county are not without remedy, either by holding them to their proper responsibility or by restraining their proceedings.

The writ is quashed. The other judges concur.



RICHARD J. LOCKWOOD *et al.*, Respondents, v. THE SANGAMO INSURANCE COMPANY, Appellant.

1. *Insurance, marine—Perils proximately causing loss, if insured against, need not be extraordinary.*—If a boat insured was seaworthy when leaving port, it does not affect the liability of her insurers whether or not the peril from which she suffered was an ordinary one or one which the boat, under good management, could safely have encountered—provided it was insured against and was the proximate cause of the loss—or whether it was extraordinary, and one which she was not built to encounter.
2. *Insurance, marine—Total loss—Damage of over fifty per cent. at time of repair, constructive total loss.*—A damage of over fifty per cent. of the value of an insured vessel when repaired is a constructive total loss of the vessel, in case of the policy containing no express provision to the contrary, and not one-half of its value in the policy.
3. *Insurance, marine—Abandonment, jury should be told what acts constitute.*—In an action on a policy of marine insurance, the jury should be told what acts are necessary to constitute an abandonment, or whether certain acts claimed to have been proved would constitute such abandonment.
4. *Insurance, marine—Agreement of parties best evidence of value of interest insured, when.*—In case of a total loss of an insured vessel, the agreement of the parties—no fraud being shown—and not the varying opinion of witnesses, is the best evidence of the value of the interest insured, and they must be governed by it.

*Madill and Dillon*, for appellant.

I. The instructions inform the jury that this boat, in order to be seaworthy, was required to be able to endure the ordinary perils of navigation on the Missouri river. And such is the law. (1 Phillips on Ins. 544; 2 Sumn. 197.) In other words, if the boat was lost by any injury, cause or peril not extraordinary in its character, the defendant could not be held liable. But the court further instructed the jury, in effect, to return a verdict for the plaintiffs if they found that the boat was lost from any peril of the river—utterly ignoring the distinction between ordinary and extraordinary perils. The result was that this boat, rotten from the outset, and totally unfit and unable to endure the usual and ordinary difficulties of navigation to be met with by all boats on all trips in the Missouri river, finally yielded to a series of these difficulties and sunk. And the jury were at liberty to find, and did, under the letter and spirit of this instruc-

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Lockwood et al. v. The Sangamo Ins. Co.

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tion and the argument of plaintiffs' counsel upon this precise point, find for the plaintiffs.

II. The third instruction, given at the instance of plaintiffs, required the jury to determine whether "an abandonment" had been made of the boat to the defendant. It does not, nor does any instruction in the case, attempt to instruct this jury what, in contemplation of law, constitutes an abandonment.

III. The third instruction, moreover, required the jury, if they believed the boat was damaged by sinking to more than half its value; and that abandonment, etc., was made, to find for the plaintiffs. On the contrary, the true rule is "that if the amount required to be expended in raising and repairing the vessel will be more than one-half of the value of the vessel when repaired, at the place of repair, then it is a case for constructive total loss by abandonment." (*Bradlie et al. v. Maryland Ins. Co.*, 12 Pet. 394.)

IV. The defendant asked an instruction on the question of damages based on the proof of the value of the boat, as distinguished from the value of the interest insured as stated in the policy. This instruction was refused. The plaintiffs, on the contrary, asked and the court gave an instruction on the question of damages, based on the value of the interest stated in the policy instead of the value of the boat. This was error. (*Peele et al. v. Merchants' Ins. Co.*, 3 Mason, 70; *Bradlie et al. v. Maryland Ins. Co.*, 12 Pet. 378; 2 Pars. Mar. Ins. 134.)

*Rankin & Hayden*, for respondents.

I. The real question for the jury was, what was the proximate cause of the loss? and the main instruction asked by the plaintiffs did not go nearly so far in their favor as the court would have been justified in giving. (*St. Louis Ins. Co. v. Glasgow*, 8 Mo. 713; *Columbia Ins. Co. v. Lawrence*, 10 Pet. 508; *Waters v. Washington Ins. Co.*, 11 Pet. 213; *Peters v. Warren Ins. Co.*, 14 Pet. 99; *Merchants' Ins. Co. v. Butler*, 20 Md. 41; *Buck v. The Royal Exchange*, 2 B. & A., 73; *Walker v. Mortland*, 5 B. & A. 171; *Dixon v. Saddler*, 5 M. & W. 405; 8 M. & W. 895; *Redman v. Wilson*, 14 M. & W. 476.) No recent decisions can

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Lockwood et al. v. The Sangamo Ins. Co.

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be found antagonistic to the law as laid down in these cases. On the contrary, where changes have been made, they have been from the doctrine of the old English law, which held the assured responsible for negligence, to that which holds the underwriter liable for negligence unless that negligence is the direct and proximate cause of the loss. See the changes which have been made in Ohio (Perrins, Adm'r, v. The Protection Ins. Co., 11 Ohio, 147); and in New York (Mathews v. Howard Ins. Co., 11 N. Y. 9); also Copeland v. N. E. Ins. Co., 2 Metc. 432; C. J. Gibbon's account of the law and the reasons for it, as now held in England and America (Am. Ins. Co. v. Insley, 7 Penn. St. 223), and the more recent cases which show that the maxim *causa proxima*, etc., is now more strenuously insisted upon and more freely applied than ever before. (Nelson v. Suffolk Ins. Co., 8 Cush. 477; Johnson v. Berkshire Ins. Co., 4 Allen, 388; Phoenix Ins. Co. v. Cochrane, 51 Penn. St. 149.)

II. The second instruction, as to the *quantum* of damages, was properly refused by the court. (a) The policy was a valued policy, and the agreed value is conclusive on the parties, except where there is a total want of insurable interest, or fraud, neither of which was pretended. (The Marine Ins. Co. v. Hodgson, 6 Cranch, 206; Alsop v. Commercial Ins. Co., 1 Sumn. 451; Patapsco Ins. Co. v. Coulter, 3 Pet. 242; Carson v. Marine Ins. Co., 2 Washb. 408; 16 La. Ann. 235; 3 Blatchf. 231. (b) There was no competent evidence tending to show that, at the time the policy was taken out, the value was less than that stated in the policy. (c) The instruction which the court gave at the request of the plaintiffs, upon the measure of damages, directed the jury only to "assess the damages at the amount of the damage sustained to the interest insured;" so that, even if defendant's position were correct, it could not complain.

BLISS, Judge, delivered the opinion of the court.

The defendant issued to the owners, for the use of plaintiffs, a policy of insurance upon the steamer Bridgeport, bound for the upper Missouri. The boat was sunk a little below Sioux City, and this suit was brought to recover the amount of the

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Lockwood et al. v. The Sangamo Ins. Co.

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insurance. The defense was based upon the alleged misconduct of the master, who was one of the owners, and a large amount of testimony was offered upon both sides, making a ponderous record, but the only questions of law preserved are raised by the instructions.

The first, given at the instance of the plaintiffs, instructed the jury that the steamer, to have been seaworthy when she started, "must have been sufficiently strong and staunch, well manned, equipped, and supplied to endure the ordinary perils of the voyage she was about to make," etc. Of this the defendant does not complain, but strongly condemns the second, which is as follows: "If the jury believe from the evidence that the steamboat Bridgeport was seaworthy at the time she left the port of St. Louis, that on her voyage she met with a peril or perils of the river above Omaha, which caused her to sink and become lost, then it is immaterial for the jury to consider whether, before she met with the perils which so caused her loss, she received other injuries which only indirectly or remotely contributed to the loss, or whether the negligence, carelessness, or mistakes of those in charge of her remotely contributed to the loss."

The defendant does not directly object to the well-settled doctrine contained in the latter part of this instruction, but complains that as a whole it contains a proposition inconsistent with the former instruction, and is thus calculated to mislead. This inconsistent proposition is supposed to be embraced in the hypothesis that the boat was sunk by meeting "a peril or perils above Omaha," etc., and defendant claims that these should have been extraordinary perils, inasmuch as by the former instruction the boat was supposed to be able to safely encounter ordinary ones. But this is a play upon words. The evidence shows that this boat was broken in and finally sunk from sundry collisions with snags. Unfortunately for our commerce, this grievous nuisance is a very common one upon our great river, and if the first instruction intended to convey the idea that boats must be sufficiently strong and staunch not to be endangered by snags, it went too far; for though, in order to constitute seaworthiness, it is necessary that boats for the Missouri trade be built with

stronger hulls than for rivers where there is no such danger, yet our experience shows that, even with the best boats and extra care, it is impossible wholly to guard against this peril. And besides, the objection assumes a false proposition of law; for if the boat was seaworthy when leaving port, it does not matter whether or not the peril from which she suffered was an ordinary one, and one which the boat, under good management, could have safely encountered—provided it was insured against and was the proximate cause of the loss—or whether it was extraordinary, and one which she was not built to encounter.

The chief controversy has arisen upon the third instruction, which is as follows: "If the jury believe from the evidence that, after the boat sunk, she lay in such a place or manner that she could not, under all the circumstances of the case, have been raised and saved; or if the jury believe from the evidence that the property insured was damaged by the sinking to more than half its value, and that notice of abandonment was given and abandonment made by the captain of the boat to the defendant's agent, shortly after the sinking, then, in either of these events, the loss was a total loss."

This instruction contemplates both an actual and constructive total loss, and counsel object principally to the manner of stating the latter, and claim that the rule was not given. Judge Story, in *Bradlie v. The Maryland Ins. Co.*, 12 Pet. 398-9, says: "In respect to the mode of ascertaining the value of the ship, and of course whether she was injured to the amount of half her value, it has, upon the fullest consideration, been held by this court that the true basis of the valuation is the value of the ship at the time of the disaster; and that if, after the damage is or might be repaired, the ship is not or would not be worth, at the place of the repairs, double the cost of the repairs, it is to be treated as a technical (constructive) total loss." And Phillips on Insurance, at the close of article 1539, thus gives his conclusion from the cases: "A damage over fifty per cent. of the value of the vessel when repaired is a constructive total loss of the vessel in case of the policy containing no express provision to the contrary, and not one-half its value in the policy."



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Lockwood et al. v. The Sangamo Ins. Co.

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Counsel complain because the jury were told to predicate their finding, so far, upon the damage "by the sinking to more than half its (the boat's) value." This certainly is not very full upon this point; but could the jury have been misled? What meaning must they necessarily have attached to this direction? They must have understood that they were to find that the boat, after it was sunk, was not worth half as much as if afloat, or as if afloat and free from the injuries that caused the sinking. And what is the criterion of such diminished value? Evidently the cost of raising it, or of raising it and repairing the injuries. So far as the right to abandon was based upon the extent of damage, the rule, as given, was harder upon the plaintiffs than though it had been given in the approved manner.

The same instruction is complained of because the question of law, as to what constitutes an abandonment, seems to have been left to the jury. Its language in this respect is not fortunate. To make an abandonment to the insurer involves certain acts on the part of the insured, and the jury should be told what acts are necessary, or whether certain acts claimed to have been proved would constitute such abandonment. But, in considering instructions, we must always look to the evidence and the real controversy between the parties. It is not disputed that the boat was sunk, that the master and crew left it, and that defendant's agent was at once notified of the facts. It is also clearly established that the insured inclosed to the agent, in a letter specifying its object, a copy of the protest; and the clerk who delivered it inquired of him if anything further was necessary, and he replied that he thought not. The loss was treated throughout, by all the parties, as an actual total loss, and not a constructive one; and the controversy was not had upon the question of abandonment, or whether the boat could be raised and repaired for half its value, but upon its seaworthiness and the conduct of the master in navigating it. Whether precisely regular or not, this instruction could not have prejudiced the defendant.

The action of the court in giving and refusing instructions in regard to the value of the interest insured is also questioned. This was not an open, but a valued, policy. It was expressly

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Tennison, by next friend, v. Tennison et al.

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agreed that the interest insured was worth \$7,500, upon which a policy for \$5,000 was issued. The loss being a total one, the agreement of the parties—no fraud being shown—and not the varying opinion of witnesses, is the best evidence of this value, and they must be governed by it. (3 Kent, 273; Phillips on Ins., art. 1178; 1 Pars. Mar. Ins. 258; Griswold v. The Union Mar. Ins. Co., 3 Blatchf. 231.)

This is one of those strongly litigated cases where all the material facts have been passed upon by a jury, and the defeated party seeks to avoid the result by raising technical questions that could not have affected it.

We find no errors by which the defendant could have been injured, and the other judges concurring, the judgment will be affirmed.

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**RUTH TENNISON, BY NEXT FRIEND, Plaintiff in Error, v. ARCHIBALD TENNISON et al., Defendants in Error.**

1. *Equity—Husband and wife—Contracts between, when valid.*—A contract between husband and wife will be held good in equity, as a general rule, when it would be valid and binding at law if made with trustees of the wife for her benefit. And in equity, the intervention of trustees is not an indispensable prerequisite to the validity of the contract.
2. *Husband and wife—Equity—Property acquired by husband to be used for benefit of wife—Husband will be treated as trustee.*—Where a husband received funds, not for the purpose of appropriating them to his own use, but expressly and by positive agreement for the benefit of his wife, and to be appropriated to her sole and separate use, and afterward made the contemplated purchase in his own name, equity will treat him as holding the title as trustee for his wife.

*Error to Second District Court.*

*Ewing & Holliday, and Perryman & Denning, for plaintiff in error.*

I. There being no bill of exceptions, this court will only notice error apparent on the face of the record proper. (Bateson v. Clarke et al., 37 Mo. 34; State, to the use, etc., v. Matson et al., 38 Mo. 490.) Courts of equity, for many purposes,

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Tennison, by next friend, v. Tennison et al.

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treat the husband and wife as distinct persons, capable of contracting with each other and of having separate estates, debts, and interests. (Arundell v. Phipps, 10 Ves. 144-9; Livingston v. Livingston, 2 Johns. Ch. 539; 2 Sto. Eq., § 1368; Putnam v. Bicknell, 18 Wis. 333.)

II. The petition states facts sufficient to clothe the husband with a trust as to the land mentioned in decree of Circuit Court. (Little v. Maul, 2 Ired. N. C. Eq. 18; 2 Leigh's N. P. 1109; 5 Whart. 138; 2 Kent, 5th ed., 137.) And when the rights of creditors or *bona fide* purchasers are not in the way, courts of equity will compel the execution of the trust for the benefit of the wife. (Walker v. Walker, 25 Mo. 367; 27 Mo. 375; 2 Sto. Eq., § 1372; Darby v. Darby, 3 Ark. 399; Rich v. Cockell, 9 Ves. 375.)

III. There is a marked difference between the property in possession of the wife at date of marriage and property belonging to the wife in action. Chancery will restrain the husband from proceeding in the courts to reconvey such chose until a provision is made for her out of the property; for such rights in action are of an equitable nature and property of equitable cognizance. (2 Kent, 139-41.)

IV. Courts of equity will compel him to carry out his contract made with the wife, though it be by parol. (2 Sto. Eq., §§ 1372, 1374; 2 Kent, 166; Livingston v. Livingston, 2 Johns. Ch. 537; Arundell v. Phipps, 10 Ves. 129-45; Bullard v. Briggs, 7 Pick. 533; Garlick v. Strong, 3 Paige, 440.)

V. The equity of the wife attaches where the husband obtains the possession of the property by fraud. (Spence's Eq. Jur. 488; Colmer v. Colmer, 2 Ark. 98.)

*Relfe & Arnold*, and *Bush & Beale*, for defendants in error.

I. Plaintiff's petition does not state facts sufficient to constitute a cause of action. It does not show that the \$100 in gold was given for the sole and separate use of plaintiff, but shows it to have been such a gift that it became the absolute property of the husband when he reduced it to possession. (2 Kent, 135-41;

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Tennison, by next friend, v. Tennison et al.

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Sallee v. Arnold, 32 Mo. 532; 2 Blackst. Com. 396-7; Mardree v. Mardree, 9 Ired. 295; Chase v. Palmer, 25 Maine, 341; Woelper's Appeal, 2 Barr, 71.)

II. Plaintiff's husband could not have been a trustee for plaintiff unless she had a separate estate; and by her petition she shows that she waived her right to have a separate estate. (40 Mo. 61; Moss v. McCall, 12 Ala. 630.)

III. Equity will not interpose to divest the husband of his wife's personalty when he is invested with it by law, or when he has reduced it to possession. The wife's equity to a suitable provision for the maintenance of herself and children out of her separate estate does not attach, except upon that part of her personal property in action, which the husband can not acquire without the assistance of a court of equity; and if the husband acquires possession of the wife's personal property, though it should have been of an equitable nature, chancery will leave him in undisturbed possession of it. (2 Kent, 141; Shaw v. Mitchell, Daveis's, 216.)

IV. Courts of equity will never be called into activity to remedy the consequences of laches or neglect. (Creath v. Sims, 5 How. 192; Lewis v. Baird, 3 McLean, 56; Perry v. Craig, 3 Mo. 360.)

V. The contract by which the money and land warrants were to be invested in lands in plaintiff's name was not published until the husband had disposed of the lands, and is not alleged or proved to have been in writing, acknowledged, or recorded. (R. C. 1855, p. 459, §§ 17, 18; 19 Mo. 543; 31 Mo. 230.) The court can not set up a verbal contract between the husband and wife to create in the wife any estate or right to the land which a court of equity could recognize. (2 Sto. Eq., § 1379.)

VI. The contract, as set forth in plaintiff's petition, was not sufficient to show that the land in suit was clothed with a trust that the law would enforce against third parties, or that third parties were required to take notice of. (R. C. 1855, p. 459-60, §§ 17-19; 31 Mo. 230.)

VII. The petition does not show that any of the funds were given to plaintiff for her sole and separate use, and does not

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Tennison, by next friend, v. Tennison et al.

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ask that the land be vested in plaintiff for her sole and separate use.

VIII. If the decree be found to be correct upon the case made, it will be affirmed. If the decree is unsupported by the evidence, it will be reversed and remanded (as was done in this case by the Second District Court), or the bill dismissed. (2 Mo. 126; Labarge v. Channin, *id.* 145; Baker v. McCarty, 5 Mo. 1; 41 Mo. 574; Rutherford v. Williams, 42 Mo. 37; Knowles v. Mercer, 16 Mo. 455.)

CURRIER, Judge, delivered the opinion of the court.

This is a proceeding in equity to vacate and set aside certain deeds, and for a decree vesting in the plaintiff the title to lands therein described. An unauthenticated draft of a bill of exceptions appears in the record, the judge before whom the cause was tried having refused to sign it because of its alleged unfairness and insufficiency. There is, therefore, nothing but the record proper before this court upon which it can act; and that presents the single question of the sufficiency or insufficiency of the petition to justify the awarding of the relief prayed for, the truth of the facts therein alleged being assumed.

The petition shows in brief that the plaintiff intermarried with the defendant, Archibald Tennison, many years ago, and that they have ever since lived together as husband and wife, and are still so living together in that relation; that the plaintiff, subsequently to such intermarriage, derived from her father and his estate a considerable amount of money and property; that it was mutually arranged and agreed upon between herself and husband that he should take a certain portion of such property as his own absolute estate, the plaintiff waiving her right to a settlement of any portion of it upon herself, and that he did so receive and appropriate to his own use his agreed proportion of said property; that her husband, in consideration thereof, agreed to invest certain other moneys, together with certain land warrants acquired by the plaintiff from her father and his said estate, in lands to the sole and separate use of the plaintiff and in her name; that her husband, in consideration and in pursuance of the premises,



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Tennison, by next friend, v. Tennison et al.

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did in fact apply, use, and invest such moneys and land warrants in the purchase and acquisition of the lands described in the petition, taking a deed thereof in his own name; the plaintiff supposing and believing, however, that the lands were conveyed directly to herself for her separate use. The petition further shows that the plaintiff's husband and the other defendants entered into a fraudulent combination and conspiracy to cozen and cheat the plaintiff out of her equitable right, title, and interest in said lands; and that her husband, in pursuance of such fraudulent conspiracy, conveyed said lands to the other defendants voluntarily and without consideration, and with a view fraudulently to cut off and defeat the plaintiff's equitable rights, the grantees therein being parties to the alleged fraud. The petition also shows that two of said grantees have purchased and acquired the interest of one of the other grantees, taking such interest, however, with a full knowledge of the alleged fraud.

Such is the substance of the petition, and the question is raised whether the post-nuptial agreement therein stated, and the other connected facts therein alleged, are of a character to warrant the granting of the relief sought.

[The theory of the common law that husband and wife, for legal purposes, constituted but one personality, and that they are consequently incompetent to contract with each other, has but a limited and quite restricted application in equity. For many purposes courts of equity treat them as separate and independent persons, and fully recognize their authority and capacity to make valid and binding contracts between themselves, and to have separate and independent estates, rights, interests and liabilities. A contract between husband and wife will be held good in equity, as a general rule, when it would be valid and binding at law if made with the trustees of the wife for her benefit. In equity, the intervention of trustees is not an indispensable prerequisite to the validity of the contract. (2 Sto. Eq. Jur., §§ 1368, 1372-4; Barron v. Barron, 24 Verm. 375; Wallingsford v. Allen, 10 Pet. 583; Kenny v. Kenny, 5 Johns. Ch. 463; Resor v. Resor, 9 Ind. 347.)]

If the contract set out in the petition had been made between

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Tennison, by next friend, v. Tennison et al.

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Archibald Tennison acting in his own behalf, and trustees appointed for that purpose acting in behalf of his wife, the validity of the contract would hardly be questioned either in law or equity.

It has been decided in Wisconsin that an absolute conveyance of real or personal property by the husband to the wife, although void at law, will be sustained in equity; and that such conveyance will vest the title to the property in the wife, as against all persons except the husband's creditors; and that it will especially be so held where the transfer was fairly made, and upon a meritorious consideration moving from the wife. (Putnam v. Bicknell, 18 Wis. 333.)

In Indiana it was held in *Resor v. Resor*, *ubi supra*, that where it was agreed between the husband and wife that the former should invest certain moneys, the property of the wife, in lands for her use and the use of her son, the money received for the purpose stated would be treated in the hands of the husband as had and received to her use; and that if such money was invested in real estate by the husband and in his own name, he would be regarded in equity as trustee for his wife, and as holding the property for her use; and that the agreement between the husband and wife, although verbal, was not within the statute of frauds. Resor obtained the money in that case from the estate of his wife's father; and the material facts shown were quite identical in their character with the facts alleged in the petition in the case at bar.

It is objected, however, in the case at bar, that Tennison, the husband, had reduced the money and property which were employed in the acquisition of the disputed premises, to possession; and it is thence argued that such money and property thereby became his, and that he was consequently at liberty to use and dispose of it as he pleased and without accountability to his wife. The conclusion may be a legitimate one at law, but it is not so in equity, as we have already, perhaps, sufficiently seen.\* In equity, the mere reception of the property by the husband is not such a reducing of it to possession by him as to defeat the equitable rights of the wife, unless the husband received it solely in

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State ex rel. Webster, relator, v. Knight, Circuit Judge.

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the exercise of his marital rights and for the purpose of appropriating it to his own use. (See the several authorities already cited.)

In the case before us the petition abundantly shows that the husband did not receive the money and warrants for the purpose of appropriating them to his own use, but expressly and by positive agreement for the benefit of his wife, and to be appropriated to her sole and separate use. He made the contemplated purchase in his own name, and equity will treat him as holding the title as trustee for his wife. The other defendants acquiring their interest without consideration, and as the result of a conspiracy to which they were parties to defraud Mrs. Tennison out of her equitable rights, stand in no better position.

The judgment of the District Court will therefore be reversed, and that of the Circuit Court affirmed. The other judges concur.

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STATE *ex rel.* WEBSTER, Relator, v. JAMES K. KNIGHT,  
CIRCUIT JUDGE, Respondent.

1. *Mandamus* — *Verdict* — *Costs* — *Surplusage* — *New trial*. — A verdict in these words, "We, the jury, find for the defendants, they to pay the costs of this suit," is a good and complete verdict. That part of it relating to the costs was merely void, and should have been regarded as surplusage. A circuit judge refusing to receive such a verdict may be compelled to do so by proceedings in *mandamus*. But plaintiffs in the suit will have leave to file their motion for a new trial in the same manner as if the verdict had been received and entered at the proper time.

*Petition for mandamus.*

E. W. Pattison, and Rankin & Hayden, for relator.

The verdict was a good one, and should have been recorded; and in entering judgment upon it the surplusage should have been stricken out, leaving that part which was a verdict upon the issue submitted to the jury. (1 Graham & W. on New Trials, 136, and cases cited; 8 Bac. Abr. 116, and cases cited; 16 Johns. 307.)

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State ex rel. Webster, relator, v. Knight, Circuit Judge.

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*Hitchcock & Lubke*, for respondent.

I. The verdict alleged by relator is no verdict at all, or if it is to be treated as a verdict, it was not sensible, consistent, or responsive to the issue. (a) The verdict was not sensible or consistent in that the jury say "we find for the defendants, *they*," etc., the fact being that there were two plaintiffs and one defendant, so that it was impossible to say whether the jury intended to find for the plaintiffs, "they" to pay the costs, or the defendant, "he" to pay the costs. The jury may have mistaken the designation of the parties to the suit before the court. (b) It was not responsive to the issues in that the jury failed to find the value of the property in controversy, which they ought to have done if they intended to find for the defendant; and it was not responsive to the issues in that it was conditional as to the payment of costs. (1 Wagn. Stat. 343, § 6; *State v. Ostrander*, 30 Mo. 13.) The supposed verdict was clearly within the exceptions stated in the opinion of this court in *State ex rel. Nicholson v. Rombauer*, 44 Mo. 594.

II. Even if this court should see fit to grant the peremptory writ, it should not require the respondent to enter up the verdict as of the 22d of December, A. D. 1869, because the plaintiffs will be injured in their right to file a motion for a new trial, the December term of the Circuit Court — the term at which the trial was had — having passed.

WAGNER, Judge, delivered the opinion of the court.

This is a petition asking that a writ of *mandamus* may be issued against the respondent, who is one of the judges of the St. Louis Circuit Court, to compel him to receive a verdict rendered by a jury. It seems that there was a case pending in said court wherein Smith and others were plaintiffs, and Webster, the relator, was defendant, in which the jury returned the following verdict: "We, the jury, find a verdict for defendants, they to pay the costs of this suit." This verdict the respondent refused to receive, and discharged the jury. The refusal, it appears, was based on the fact that the jury assessed costs against the defendant when

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 Kenrick v. Cole et al.
 

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at the same time they found in his favor. In this they erred and went beyond their power, as our statute declares that in all civil actions and proceedings of any kind the party prevailing shall recover his costs against the other party, except in those cases in which a different provision is made by law.

The jury found for the defendant; the verdict was good and complete. The matter of costs was not in issue, and was not submitted to them. That part of their verdict, therefore, was merely void, and should have been disregarded as surplusage. The writ will issue, but the plaintiffs in the suit will have leave to file their motion for a new trial in the same manner as if the verdict had been received and entered at the proper time.

Peremptory writ ordered. The other judges concur.

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PETER RICHARD KENRICK, Defendant in Error, v. GEORGE B. COLE AND LOUIS BOLDOC, Plaintiffs in Error.

1. *Wills—County Courts—No direct appeal from in matters of probate.*—A County Court, where there is no Probate Court, under section 7, chapter 137, Gen. Stat. 1865, has exclusive jurisdiction of all questions relative to the admission of wills to probate, and from its decision therein there is no direct appeal. Subdivision 2, section 2, chapter 136, Gen. Stat. 1865, can not be applied to County Courts as courts of probate in the absence of express provision elsewhere in the statute touching such appeals. The appellate jurisdiction of the Circuit Court in matters of probate has been uniformly referred to the provisions of the statute as now embraced in section 1, chapter 127, Gen. Stat. 1865; and the closing paragraph of that section, providing for appeal "in all other cases \* \* under this law," construed in connection with section 1, chapter 2, p. 174, R. C. 1865, does not embrace the subject of wills or their probate.
2. *Wills—County Court—Orders of, touching wills, not specifying who shall receive property devised—Effect of.*—An order of a County Court touching a probate estate, which does not specify who individually are to receive the property devised, but simply announces that the property shall go to the next of kin, is not an order of distribution or apportionment within the meaning of the third subdivision of section 1, chapter 127, Gen. Stat. 1865.

*Error to Second District Court.*

*Perryman & Denning, and Glover & Shepley, for plaintiffs in error.*



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Kenrick v. Cole et al.

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I. The County Court of Washington county had exclusive, original jurisdiction of the matter of probating this will. (Gen. Stat. 1865, ch. 137, § 7.) It was therefore competent to render any judgment in the premises. That court had power to render just such a judgment as it did. (Jackson v. Jackson, 4 Mo. 210.)

II. An appeal, as here taken, will not lie from the judgment of the County Court admitting a will to probate or rejecting it. (In the matter of Milton Duty's Estate, 27 Mo. 43.)

III. The County Court made no order of distribution.

IV. If the defendant in error thinks himself aggrieved by the judgment of the County Court, he has his remedy. (Gen. Stat. 1865, ch. 131, § 29; In the matter of Milton Duty's Estate, 27 Mo. 43; Dickey *et al.* v. Malechi, 6 Mo. 177.)

V. Even if the appeal was properly granted, the Circuit Court had no power to look into the judgment of the County Court as to rejection of the tenth clause in the will and refusing to probate the same. (Const. Coux v. Lowther, 1 Lord Raym. 601; Rush v. Rush, 19 Mo. 441; Smith's Adm'r v. Rollins, 25 Mo. 408; Pomeroy v. Betts, 31 Mo. 419; Cov. Mut. Life Ins. Co. v. Clover *et al.*, 36 Mo. 392.)

VI. Certainly the County Court had the power to probate part of the will and not the whole. (Jackson v. Jackson, 4 Mo. 210; Graham v. O'Fallon, 3 Mo. 507; 4 Mo. 338; Redf. on Wills, 181, note 48.) It is an exercise of power applicable to all instruments. (Greenfield's Estate, 14 Penn. St. 489.)

*Garesche & Mead*, for defendant in error.

I. The duty of the County Court was simply to confirm or reject the probate taken by the clerk. (Gen. Stat. 1865, p. 529, § 13.)

II. The whole will should have been probated, even though there were objectionable features in it. (Dayton's Surrogate, 58; Poole v. Poole, 35 Ala. 19.) In probate the question "is simply whether the writing is the last will of deceased, and whether it was duly executed and published by him as such." Hence that he intentionally omitted "children," matters not.

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Kenrick v. Cole et al.

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(Loveux v. Keller, 5 Iowa, 201; Jolliffe v. Fanning & Phillips, 10 Richardson, S. C., 193.)

III. Therefore the appeal of defendant in error was not from the probate of a will, but from extra-judicial matter, and for which appeal is given from the Probate Court to the Circuit Court. Section 7, p. 557, Gen. Stat. 1865, confers jurisdiction on County Court. Section 1, p. 575, gives an appeal to Circuit Court in such cases. (In the matter of Milton Duty's Estate, 27 Mo. 43.)

IV. The decisions of *Graham v. O'Fallon*, 3 Mo. 354; *Jackson v. Jackson*, 4 Mo. 210; *Dickey v. Malechi*, 6 Mo. 178, are not adverse; they relate to cases where wills were lost. Parts of wills were sought to be proven. This probate was resisted under the rule that the whole will must be probated. The Supreme Court decide that where the will is lost, part of a will may be probated, and that such cases are exceptions to the general rule.

V. The rule must work both ways. If the probate of a will be so conclusive that a decision in probate declaring, as in this instance, that a clause is unconstitutional, is final as part of an order of probate, then, on the other hand, every order of probate confirming clauses of a will, by the admission of the instrument to probate, precludes all questions as to the validity and the construction of the provisions of the will. Our courts abound with decisions which establish a contrary practice. (*Chambers v. City of St. Louis*, 29 Mo. 543; In the matter of *Geo. Collier's Will*, 41 Mo. 503.)

BLISS, Judge, delivered the opinion of the court.

This cause came into the Circuit Court by appeal from the following order of the County Court of Washington county, made at its August term, 1868, to-wit:

"In the matter of the probate of the last will and testament of Maria L. Lamarque, deceased. At a term of this court held on the fourth day of the August term, 1868, the paper purporting to be the last will and testament of Maria L. Lamarque, deceased,

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Kenrick v. Cole et al.

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being by George B. Cole, the acting executor, offered for probate, and Louis Bolduc and other heirs at law and next of kin to said deceased, appearing in opposition to the same and to the tenth clause of said will, on the ground that the devise to Peter Richard Kenrick, a priest and bishop of the Catholic church, a religious sect, order, or denomination, was void, as in violation of the provisions of section 13, article 1, of the constitution of the State of Missouri; and the said court having heard the arguments of counsel for the respective parties, and having duly considered the same, it is ordered and adjudged by the court that the said will be admitted to probate as the last will and testament of Maria L. Lamarque, deceased, except the following clause thereof, to-wit:

“ ‘10th. All the remainder, rest, and residue of the estate, real, personal, and mixed, whereof I shall die seized, entitled, or possessed, including herein also everything which, though herein disposed of, may by lapse, or other failure in intendments of law, be regarded as undisposed of, I give, bequeath, and devise to Peter Richard Kenrick, of the city and county of St. Louis, Missouri, constituting him my residuary legatee.’ ”

“ Which said clause and legacy devised to Peter Richard Kenrick is void and of no effect, and the said Maria L. Lamarque is adjudged and decreed to have died intestate as to all estate and property not specially devised by the first, second, third, fourth, fifth, sixth, seventh, eighth, and ninth clauses of said will, and that the residue of her said estate not especially devised as aforesaid be distributed by said executor to the next of kin of said deceased.”

The Circuit Court reversed so much of the order of the County Court as begins with the words “except the following clause thereof, to-wit,” reciting the clause. This action of the Circuit Court was affirmed in the District Court, and the case comes here by error. The next of kin object to the action of the Circuit Court principally upon the ground that the County Court possessed exclusive jurisdiction upon the subject-matter of its order, and that from its decision there is no direct appeal.

That County Courts, where there is no Probate Court, have original and exclusive jurisdiction “in all cases relative to the

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Kenrick v. Cole et al.

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probate of last wills and testaments" (see § 7, ch. 137) is undisputed; and it is clear that the general language at the close of the section, "subject to appeal in all cases to the Circuit Court in such manner as may be provided by law," can not take effect unless the statute otherwise provides the mode of appeal.

The closing paragraph of section 1, chapter 127, General Statutes, might be construed to provide for an appeal from the orders of County Courts, relative to the probate of wills, if the General Statutes were an original enactment. The paragraph provides for an appeal "in all other cases where there shall be a final decision of any matter arising under the provisions of this law," which provision is a copy from the Revised Statutes of 1855, excepting that the word "law" is substituted for "act." This slight change was probably made for the reason that the revision of 1855 consisted of separate acts, while that of 1865 consists of one enactment. To what, then, do the words "this law" refer—to chapter 127, or to title 32 of "Estates," etc., or to the whole act, *i. e.* the whole volume? The ambiguity is removed by section 5 of chapter 224, which provides that the provisions of the General Statutes, so far as they are the same as those of existing laws, shall be construed as a continuation of such laws, etc.; for, by referring to the Revised Statutes of 1855, we find that section 1, chapter 127, "of appeals," is a part of the act of 1855, concerning administration, which does not embrace the subject of wills or their probate, is a continuation of that act, and hence the words "this law" only embrace the purview of that act.

The language, however, of section 2, chapter 136, General Statutes, gives Circuit Courts "appellate jurisdiction from the judgments and orders of County Courts and justices of the peace in all cases not expressly prohibited by law," etc.; but this provision does not authorize an appeal in the ordinary form from the County Courts unless such appeal is expressly provided for by other statutes. (*Snoddy v. Pettis County*, 45 Mo. 361.) The appellate jurisdiction of the Circuit Court in matters of probate has been uniformly referred to the provisions of the statute as now embraced in section 1, chapter 127, General Statutes; *Dyer v. Carr's Ex'r*, 18 Mo. 246; *Wilson v. Brown's Adm'r*, 21

Mo. 410 (Judge Ryland quotes the above extract from section 2, chapter 136, but seems not to rely upon it); McGee v. Roberts, 39 Mo. 514; Baker v. Schoenman, 41 Mo. 391; and in the matter of Duty's Estate, 27 Mo. 43. In the last case Judge Richardson expressly holds that an appeal will not lie from a judgment of a County Court admitting a will to probate—thus, by implication, ignoring the general grant of appellate jurisdiction to the Circuit Court in section 2, chapter 136. Acquiescing in this view, counsel rely upon section 7, chapter 137, and upon section 1, chapter 127, of General Statutes. The former section, as we have seen, provides for an appeal “in such manner as may be provided by law.” This section is part of the chapter pertaining to County Courts, and recapitulates the several matters of probate jurisdiction given by other chapters, and, in speaking of appeals, expressly refers to those parts of the statute which provide for appeals and the method of prosecuting them. The only other provision for reviewing the action of the County Court in the probate of last wills and testaments, is contained in section 29, chapter 131; and if that section does not meet the case as suggested by the counsel for the legatee, then there is no manner expressly provided by statute, unless such action is embraced in the enumerations of section 1, chapter 127. Driven to this section, the legatee insists that the appeal is provided for in the third and twelfth subdivisions. The third subdivision grants appeals “on all apportionments among creditors, legatees, or distributees;” and if the order appealed from were an order of apportionment, in the legal sense of the term, the appeal would lie.

But we must look to the provisions of the law for apportionment, in order to see whether this order comes within them. Chapter 125 provides for the apportionment, etc., distribution of estates, and among all its provisions there is not one that bears any analogy to the order appealed from. Indeed, this order, so far as it directs distribution, amounts to nothing. It does not specify who individually are to receive the property devised by the tenth section of the will, but simply announces a principle of law that the bequest shall go to the next of kin. Even if the



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Mead et al. v. Jennings et al.

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order in relation to the tenth bequest were deemed a valid one, that part of it stating to whom or to what class of persons it belongs, without specifying them or stating the amount they or each of them are to receive, can have no effect—is not an order of distribution or of apportionment among distributees. The twelfth subdivision has already been considered, and provides, as we have seen, for cases in general arising under that part of the title embraced in the administration act of 1855.

We are not called upon to express any opinion as to the propriety of the action of the County Court, or to suggest a remedy if the legatee is aggrieved, but he is certainly not without one. We only hold that the case was not brought into the Circuit Court according to law, and in entertaining it that court committed an error.

The judgment of the District Court is reversed and the appeal dismissed. The other judges concur.

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LUCIEN MEAD AND WIFE, Appellants, v. JENNINGS *et al.*,  
Respondents.

1. *Wills—Construction of—Partition.*—A testatrix, being seized of certain property, died, leaving six heirs. By the terms of her will the executors were empowered to sell and dispose of the whole estate, real, personal, and mixed and to divide five-sixths of the proceeds equally among five of the heirs; but one portion was to be invested as they deemed best, and the proceeds paid to the sixth child, and at her death the investment was bequeathed to her heirs. In suit by the sixth child for partition of the property, *held*, that in accordance with the statute (2 Wagn. Stat. 1371, § 49), the plain intent of the testator should be made to govern, in disregard of technical rules, and that, under its provisions, plaintiff could not hold her share as tenant in common, but that the legal estate vested in the executors as donees to uses, in order to perform the duties intrusted to them by the will. Such being the law, plaintiffs would not be entitled to partition.

*Appeal from St. Louis Circuit Court.*

*Krum & Decker*, for appellants.

- I. The will in question is a devise by the testatrix to her executors that they shall sell her real estate etc., and therefore

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Mead et al. v. Jennings et al.

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the will is a mere naked power to sell, and does not pass the fee of the land.

II. If a party devise that his executors shall sell his lands and die seized, his heirs are in by descent, and consequently his executors have only a power to sell. (Sugd. on Powers, 128; Tiff. & Bull. Trusts and Trustees, 750-94; 4 Kent, 320; 2 Burr. 1027; 2 Ves. 179; 3 Ves. 513; 2 Pierre Williams, 308, 550; 4 Wash. 278; 7 Cow. 187; 9 Johns. 104.)

III. The legal title to the land of which Ann B. Jennings died seized is vested in her heirs by descent, and will remain there until divested by the execution of the power under the will. Consequently, as the legal title to the land in question is in the heirs, they are seized in law as tenants in common, and are entitled to partition. (Lambert v. Blumenthal, 26 Mo. 471.)

*H. Berry*, for respondents.

WAGNER, Judge, delivered the opinion of the court.

This was a suit brought for a partition of certain premises belonging to the estate of Ann B. Jennings, deceased. The plaintiff's wife claims to be seized in fee of one-sixth part of the premises in question, and alleges that she holds the same in common with the other defendants. Judgment was for defendants in the court below.

Whether the plaintiffs are entitled to partition depends upon the construction of the will of Mrs. Jennings, from whom the parties derive title. The disposing part of the will of the testatrix is thus: "It is my will that after my death, my executors hereinafter mentioned shall, out of my property, pay my funeral expenses and any debts that I may justly owe, and that they shall take possession, charge, and management of all my estate, real and personal; and after paying such debts, it is my will that my said executors, in whom I place full confidence and trust, shall sell and dispose of the whole of my said property, real and personal, at such time, place, and in such quantities, as to them shall seem best, and at either private or public sale; and the proceeds arising from such sales or disposition of my said prop-

erty, my said executors shall divide into six equal portions, whereof one shall be paid to my daughter, Ann M. McLaren, or her heirs; one shall be paid to my son, William H. Jennings, or his heirs; one to my daughter, Mary J. Switzer, or her heirs; one to my son, Robert M. Jennings; one it is my will my executors shall invest in any manner they may deem best, either in real estate or other property, or may loan the same, and the annual rent, dividends, or other proceeds arising from such investment, my said executors shall pay over to my daughter, Martha A. Mead (plaintiff), during her life, and, at her death, said investment I bequeath to her heirs," etc.

The true province of courts, in giving a practical construction to wills, is to disregard technical rules where they stand in the way of the manifest intention of the testator. Our statute declares that all courts and others concerned in the execution of last wills, shall have due regard to the directions of the will and the true intent and meaning of the testator, in all matters brought before them. (2 Wagn. Stat. 1371, § 49.) And in reference to the partition, it explicitly provides that no partition or sale of lands, tenements, or hereditaments, devised by the last will, shall be made under the provisions of the statute contrary to the intention of the testator expressed in the will. (2 Wagn. Stat. 973, § 47.)

The intention of the testatrix is manifested in such clear and unmistakable terms that there is nothing on which to base the application of the doctrine contended for by the plaintiff. The testatrix authorizes her executors to take possession, charge, and management of the estate, and to sell it at either private or public sale, and then makes provision for its distribution. But to Mrs. Mead the property is not to descend directly. The proceeds of the share coming to her the executors are directed to invest in any manner they may deem best, either in real estate or other property, or they may loan the same, and the annual rents, dividends, or proceeds arising from such investment they are to pay over to her during her life. She is to have the use and the enjoyment, not of the property in specie, but of the rents and profits issuing out of what it brings on reinvestment

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Gatzweiler, trustee of Mittalberger, et al., v. Morgner.

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during her natural life, and, at her death, then the investment made by the executors is bequeathed to and vested in her heirs.

The whole will shows that Mrs. Mead does not hold her share as a tenant in common; that she possesses a lifetime interest in the profits or rents which may spring from an investment made upon a sale of her share, and that, when she dies, the estate then vests absolutely in her heirs.

To decide otherwise would be doing violence to the clearly expressed will of the testatrix, and would be setting at naught the plain provisions of the statute. We think that in this case the legal estate vests in the executors as donees to uses, in order to enable them to perform the duties with which they are intrusted by the will. If the executors should neglect or fail to act as required by the testatrix, the plaintiffs have a complete remedy in equity by filing a bill to compel them to execute the trust.

Judgment affirmed. The other judges concur.

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F. W. GATZWEILER, TRUSTEE OF LEVICE MITTALBERGER, AND  
LEVICE MITTALBERGER, BY HER NEXT FRIEND, JOHN C.  
MITTALBERGER, Respondents, v. ALBIN MORGNER, Appellant.

1. Mary T. Dugan's Administrator v. Albin Morgner, *ante*, p. 48, affirmed.

*Appeal from Sixth District Court.*

*E. A. Lewis and H. C. Lackland*, for respondents.

*Krum & Decker*, for appellant.

BLISS, Judge, delivered the opinion of the court.

This is in all respects a similar action to the one decided at this term against the same defendant, and in favor of Mary T. Dugan's administrator. The estate of the wife is created by a deed precisely like the one in that case; the deception complained of is the same; the object of the action is the same, and the circumstances throughout are the same, except that Levice Mittalberger, to whose use the conveyance was made, is still living.

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Turner et al. v. Adams.

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The instructions asked by defendant, and refused, were in the nature of a demurrer to the evidence and pleadings, and the chief points made in his counsel's brief are that the estate is not a separate one, and that the husband should have joined in the suit. Those points were considered in the other case, and I will only add that if he objects to the petition because "there is a defect of parties," or because a plaintiff "is not a necessary party," he should have demurred instead of answering to the merits. (Wagn. Stat. 1014-15, ch. 165, §§ 6, 10.)

The judgment is affirmed; the other judges concurring.

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TURNER AND KNIGHT, Defendants in Error, v. INCREASE ADAMS,  
Plaintiff in Error.

1. *Equity—Chancery proceedings by attaching creditor, to set aside sale under judgment and execution—Not necessary always to exhaust legal remedies prior thereto.*—Generally speaking, a mere creditor (and he may be an attachment creditor who has not obtained a judgment) can not ask the interposition of a court of equity to set aside an execution sale of land under another judgment against the same person. He must first exhaust his legal remedies, and this is usually done by obtaining judgment and execution, with return of *nulla bona*. But where it is shown that the judgment debtor is insolvent, and that the issue of an execution would be of no practical utility, its issue may be dispensed with, and the attaching creditor may resort directly to chancery for his remedy against such judgment creditor, without such prior proceedings.
2. *Sheriff's sale—Imposture at, title under worthless.*—The title of a purchaser at a sheriff's sale, who practices any deceit or imposture, or who is guilty of any trick or device, the object of which is to get the property at an under-value, is void and utterly worthless.

*Error to Sixth District Court.*

*Henderson & Dyer, and Campbell, for plaintiff in error.*

I. Until Turner and Knight proceed to sell the land in question under their judgment in attachment, they are in no condition to ask that the deed of Adams, made by the sheriff in 1862, be set aside.

II. The lien of an attachment writ is not such an interest in



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Turner et al. v. Adams.

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land as to enable the plaintiffs in the proceedings to attach a legal title.

III. The mere statement of Adams to the sheriff, that he would pay off the judgment against Buchanan and himself, or that he would not sell at that term of the court, constitutes no fraudulent representation. 1. Because it was not made to Turner and Knight. 2. It is not alleged that it was intended and designed that it should be communicated to them, or either of them, or their agents. 3. Adams was a defendant in the execution, not the plaintiffs or the agent of the plaintiffs. Bacon and Milroy were the plaintiffs, and no declarations of Adams in regard to the sale or postponement of the sale could carry such weight as to work a fraud on Turner and Knight, or either of them. 4. If Stewart had purchased the property himself, his title would have been good as against Turner and Knight. It does not appear that Stewart was acting in concert with Turner and Knight, or that any purchase made by him was to inure to their benefit. Hence the allegation that Stewart was induced to refrain from bidding by Adams, whatever injury it might bring upon Buchanan, could not work a fraud upon Turner and Knight.

*E. A. Lewis, and McKee & Buckner, for defendants in error.*

I. Where a purchaser at sheriff's sale, by unfair practices, manages to get the property at a price far below its value, any creditor having a matured lien upon the property may have the sale declared null. A mere attaching creditor may have no such right, because the whole force of his attachment is contingent upon success in prosecuting his suit to judgment, and he therefore occupies no better position than that of any general creditor. But no such reasoning can apply to the judgment creditor, whose lien is fixed and final. Still less is it applicable to one who has a special *feri facias* against the very property under consideration. (*Martin v. Michael*, 23 Mo. 50; *Hadden v. Spader*, 20 Johns. 555.)

II. The second alleged cause of demurrer does not truly

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Turner et al. v. Adams.

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represent the allegations in the petition. It does distinctly appear that the defendant made the false representations to the sheriff and others for the specific purpose of having them conveyed to plaintiffs' agent and other intending bidders; that they were so conveyed, and operated to the effect for which they were designed. The defendant is just as responsible for their consequences as if they had been made by him directly to the plaintiffs or their agent. (*Stewart v. Nelson*, 25 Mo. 309.)

III. If no other cause of action appeared in the petition, there was enough to sustain it against the demurrer, in the allegation that the defendant bought off the bidder, David Stewart, before the sale. (*Wooton v. Hinkle*, 20 Mo. 290; *Neal v. Stone*, *id.* 294; *Stewart v. Nelson*, 25 Mo. 309; *Martin v. Michael*, 23 Mo. 50; *Abbey v. Dewey*, 25 Penn. St. 413; *Mills v. Rogers*, 2 *Littell*, 217; *Hadden v. Spader*, 20 *Johns.* 555; *Potts v. Blackwell*, 3 *Jones' Eq.*, N. C., 449; *Hendricks v. Robinson*, 2 *Johns. Ch.* 283; *McDermott v. Strong*, 4 *Johns. Ch.* 608; *Williams v. Brown*, *id.* 682.)

WAGNER, Judge, delivered the opinion of the court.

The allegations in the petition are that on the 23d of March, 1860, a judgment was rendered in the Lincoln County Circuit Court in favor of Milroy and Bacon against defendant Adams, T. G. Buchanan, and others, for \$259.05; that Buchanan being largely indebted, writs of attachment, at the suit of plaintiffs and other creditors, were placed in the sheriff's hands on the first of February, 1862, and were levied on a tract of land containing about 233<sup>24</sup>/<sub>100</sub> acres, and worth at least \$3,000; that in September, 1863, judgments were rendered in said attachment suits as follows: in favor of plaintiffs for \$2,664.50; in favor of one of the plaintiffs, Thos. Turner, for \$423.35, and in favor of Henry J. Pollard for \$914.36, with costs in each case. Special executions were issued against the attached property under the Milroy and Bacon judgment, which antedated the attachments. The attached land was advertised by the sheriff to be sold on the 20th day of March, 1862. Prior to the day of sale, but after the levying of the attachments mentioned, one David Stewart also sued out

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Turner et al. v. Adams.

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an attachment against Buchanan, and had it levied upon the same land. The petition also alleged that on the day of sale, plaintiffs, by their agent, and the said David Stewart in person, were present intending to bid the land up to something like its value, so that they might realize satisfaction, in whole or in part, of their respective demands; that defendant, who was a co-defendant in the Milroy and Bacon judgment, caused it to be understood and given out by the sheriff and other persons, that he intended to pay off that judgment, or else would have the sale postponed until the next term of court; that this information coming to plaintiffs' agent from the sheriff, he left the court-house and departed for his home in another county; that defendant, having thus gotten plaintiffs' representative out of the way, bought over the said Stewart by paying him the sum of five hundred dollars to refrain from bidding; that by means of these practices, defendant was enabled to purchase said land at the sheriff's sale for the small sum of \$331.16, thus depriving plaintiffs and the other attaching creditors of all benefit of their judgments, and of the land levied on, which, if fairly sold, would have nearly satisfied them; that the said statements made by defendants were false and fraudulent, and were expressly designed to prevent bidding at the sale, and to cheat and defraud as well the said Buchanan, as his creditors, the plaintiffs and others; and that defendant's collusion with and bribery of Stewart were with the same design and to the like effect; that but a small sum was realized for plaintiffs' judgments from the sale of other property, and the residue remains unpaid, there being no property of said Buchanan out of which the same could be made.

The prayer of the petition is that the execution sale be set aside, that a re-sale be ordered, and for a proper distribution of the proceeds, etc. To this petition there was a demurrer, which was sustained in the Circuit Court, and judgment rendered thereon for defendant. This judgment was reversed in the District Court, and the case is brought up by writ of error.

To sustain this judgment it will not be necessary to go as far as this court has recently gone in the case of *Merry et al. v. Fremon et al.*, 44 Mo. 518. It is presumed that the action of

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Turner et al. v. Adams.

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the Circuit Court was predicated upon the authority of *Martin v. Michael*, 23 Mo. 50. That case decided that a creditor at large, who had commenced suit by attachment for his debt, but who had not obtained judgment therefor, was not entitled to invoke the equitable interference of the courts to annul judgments fraudulently confessed by the debtor in favor of other persons, or to restrain by injunction the disposition of the debtor's property through the means of executions issued on such confessed judgments. It is generally true that a mere creditor who has not a judgment, and who may never obtain a judgment, has not the right to ask equitable interposition of this kind; and an attaching creditor stands in no better position, for the whole force of his attachment depends on his success in prosecuting his suit to judgment.

The rule is that it is necessary to exhaust all legal remedies before applying for the assistance of a court of chancery, and this is usually evidenced by a judgment, the issuance of an execution, and a return of *nulla bona*. But the cases hold that, where it is shown that the judgment debtor was insolvent, and that the issue of an execution would necessarily be of no practical utility, its issue might be dispensed with. (See *Merry et al. v. Fremon et al.*, *supra*; *McDowell v. Cochran*, 11 Ill. 31; *Postlewaite v. Howes*, 3 Clark, Iowa, 366.) Chancellor Kent, in *McDermutt v. Strong*, 4 Johns. Ch. 690, stated the true doctrine to be "that if the creditor has taken and exhausted all the means in his power at law, he will be entitled to the aid of a court of chancery, to discover and apply the property to satisfy the execution."

The plaintiffs prosecuted their suits by attachment to judgment, and had special executions issued; their rights were then fixed and determinate. The insolvency of Buchanan, the defendant in the attachment suits, sufficiently appears; for it is alleged that only a small sum was realized for plaintiffs' judgments from the sale of other property, and that the residue remains unpaid. It is evident that their only recourse is by proceeding against this property. As there were three several judgments all standing in the same situation, if the plaintiffs are devoid of redress

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Sheehan v. Gleeson.

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without a sale of the property on execution, it would require three separate trials for the parties to obtain their rights. This proceeding attains the same object and avoids multiplicity of suits.

That the title of a purchaser at a sheriff's sale, who practices any deceit or imposture, or who is guilty of any trick or device, the object of which is to get the property at an under-value, is void and utterly worthless, is a proposition running through the entire range of the law. If the representations and acts complained of in the petition were true, they operated as a fraud on the plaintiffs in a matter in which they had a direct interest. Defendant induced the representations on which plaintiffs' agent acted, to their detriment and injury, and then suppressed bidding by resorting to bribery. He gained an unconscionable advantage at the expense of the plaintiffs, and I am of the opinion that he ought not to be permitted to retain it.

Judgment affirmed. The other judges concur.



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JOHN SHEEHAN, Plaintiff in Error, v. JAMES M. GLEESON,  
Defendant in Error.

1. *City engineer—Discretion of, can not be delegated.*—In making city improvements, the discretion conferred upon one class of officers can not be transferred to another.
2. *Ordinances, city of St. Louis—Engineer—Curbstones—Nature of stone and precise dimensions and manner of dressing need not be specified.*—Section 14 of ordinance 5399 of the city ordinances of St. Louis, in fixing a minimum of thickness and depth of curbstones, was sufficiently specific to authorize proceedings under it by the engineer. The precise thickness of the curbstones need not be given, nor the nature of the stone nor the manner of dressing it. An ordinance may lack desirable precision, and still may so provide for the manner in which an improvement shall be made, and be such compliance with the law, although a loose one, that the courts would not be authorized to invalidate the action of city officers under it.

*Error to St. Louis Circuit Court.*

*Thomas Grace, for plaintiff in error.*

I. The only issue presented by the pleadings to the court, and which the plaintiff had to prove was whether the tax-bill sued on



was genuine ; did it bear the genuine signature of the city engineer? This fact having been proved in the affirmative, the tax-bill became and was, under the law, *prima facie* evidence of the plaintiff's right to recover. (Sess. Acts 1867, p. 74, § 11; Sess. Acts 1866, p. 302, § 5; Sess. Acts 1863, p. 76, § 4; City, to use of Creamer, v. Oeters, 36 Mo. 463; City, to use of Lohman, v. Coons, 37 Mo. 48; City, to use of Stadler *et al.*, v. Armstrong, 38 Mo. 33; City, to use of Creamer, v. Bernoudy, 43 Mo. 554.)

II. Ordinance 6140 is not invalid. It is good as far as it goes, and in conformity with the city charter.

III. Defendants insist that ordinance No. 6140, although it may be valid as far as its provisions extend, yet conferred no authority to do the work, because it failed to specify the time within which the work should be done, the dimensions of the street, the material to be used, and the manner and general regulations to govern the engineer in the construction of the street. (Sess. Acts 1867, p. 62; Art. 4, City Charter.) All the particulars regarding the time in which the work should be done, the dimensions of the street, the material to be used, the manner of doing the work, etc., need not encumber each special ordinance. It conduces to convenience and is competent for the city council to provide the material to be used, the manner of doing the work, and general regulations governing the city engineer, by general ordinance, applicable alike to this as to other streets.

*Ewing & Holliday*, for defendant in error.

I. The cases of *Ruggles v. Collier*, 43 Mo. 353, and *City, to use of Murphy, v. Clemens, Jr.*, 43 Mo. 395, are not distinguishable in principle from the present case. There is not a word in the ordinance as to the manner in which the work shall be done. It is all left to the engineer and general ordinances. The plaintiff sought refuge in general ordinances not referred to in the petition. If the plaintiff claim a right under ordinance, he must refer to the ordinance by its title and number, or he can not introduce it in evidence. There was not a particle of evidence offered by plaintiff to show that the limestone used was of

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Sheehan v. Gleeson.

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the best description of stone that could be procured in the vicinity of the city, in the opinion of the city engineer.

II. The court should hold in this case that when the charter provides that "such grading and paving to be done in manner to be prescribed by ordinance," the city council shall not delegate the "manner" to the city engineer.

BLISS, Judge, delivered the opinion of the court.

This suit is upon a special tax-bill issued by the city engineer of St. Louis to the plaintiff to recover part of the costs of curbing, guttering, macadamizing, and laying crosswalks opposite defendant's property on Wright street, in the new limits of the city. By section 10 of the revised charter of 1867 (Sess. Acts 1867, p. 73) it is provided that "the cost of paving, macadamizing, guttering, crosswalks, and curbing of the carriageways, intersections, and sidewalks of all streets," etc., "shall in all cases, except," etc., "be paid by the owners of the property in the vicinity of the works," etc. Section 11 provides that the "city engineer shall compute the cost and assess it as a special tax against the property fronting on the work, make out a bill of the assessment, and shall deliver it to the contractor for the work, who shall collect it by suit; and that, in any action brought to recover the amount thereof, such certified bill shall be *prima facie* evidence that the work and material charged in such bill have been furnished, and of the liability of the persons therein named as the owners of such property." The same act provides by section 9 that the construction of streets, as to their extent, dimensions and material, shall be had in such manner as shall be provided by ordinance; and by section 14, the council shall cause the "grading, paving, or macadamizing to be done in such a manner as shall be prescribed by ordinance."

It will be thus seen that the assessment made for the plaintiff by the engineer furnishes much of the evidence required in the first instance. The contract is not disputed, and the record shows the following ordinances, to-wit: Ordinance 6140, the first two sections of which are as follows:

"SEC. 1. The city engineer is hereby authorized and instructed to cause Wright street, from Fourteenth to Sixteenth streets, to be graded, curbed, guttered, macadamized, and the crosswalks and sidewalks to be paved.

"SEC. 2. The cost of the curbing, guttering, macadamizing, and of paving the crosswalks, shall be assessed as a special tax against the owners of the ground fronting upon said street, according to law."

Also sections 14, 25, and 26 of general ordinance 5399, concerning the engineer department, as follows:

"SEC. 14. All curbstones or curbings set upon any street, avenue, or other highway, except on First street or the wharves, shall not be less than four inches in thickness on the front edge or top, and shall be set in the ground at least twelve inches below the surface of the pavement."

"SEC. 25. All broken rock to be hereafter spread on the surface of any alley or highway in the city of St. Louis shall be of the best description that can be procured in the vicinity of the city, which, in the opinion of the city engineer, is best adapted to such purposes; and they shall be broken so that the largest will pass through a two and a half inch ring in all of their diameters.

"SEC. 26. All paving stones hereafter to be used for paving with stone on edge any street or any principal alley within the business part of the city through which heavy carts have to pass, shall be of the best quality that the vicinity of the city affords; and they shall be dressed on the top sides and end faces, so as to make close joints throughout and a full and square bottom; and the stone shall have a bed of sand properly prepared for its reception, of a depth of not less than ten inches."

The Circuit Court, at special term, gave judgment for the plaintiff, which was reversed at general term. It is unnecessary to repeat what we have so often held, that in making its improvements the city must proceed according to law, and that the discretion which may be conferred upon one class of officers can not be transferred to another. The city engineer is an executive officer, and in making city improvements he must be governed by

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Sheehan v. Gleeson.

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the city ordinances, and we have only to consider whether his action was warranted by those ordinances.

Ordinance 6140 only purports to locate the improvement and provide for the assessment of its cost. If that were all, the engineer would be powerless to proceed. But we find in the sections before recited of general ordinance 5899, specific provisions for the manner in which the work shall be done. That ordinance is imperative upon the engineer, and he is subject to all its directions.

But defendant's counsel criticise it as not being sufficiently specific, and insist that too much discretion is still left to the engineer. We should first premise that, as a matter of necessity, some discretion must be left to the executive officers. It would be difficult for ordinances to specify every particular of a work; but they must be more or less general, and must take many things for granted in the history, geography, and topography of the place, and in the arts called into requisition by the improvements ordered. And we should further premise that an ordinance may lack desirable precision, and still may so provide for the manner in which an improvement shall be made, and be such a compliance with the law, although a loose one, that the courts would not be authorized to invalidate the action of the city officers under it. It is not every irregularity or omission that goes to the substance of a proceeding.

Counsel object that the precise thickness and depth of the curbstones, their material and manner of dressing, are not fixed by the ordinance. I can see no plausibility even in either of the objections except the first. The ordinance fixed a minimum of thickness and depth, and the contract shows that the curbing was built of precisely those dimensions. It certainly was a direction in relation to the manner of building it, though justly subject to criticism as not being sufficiently specific. Though an irregularity in the action of the common council, yet it was action in the right direction, and we should not be warranted in holding the proceedings under it as wholly unauthorized. The nature and manner of dressing of common curbing in the city is as well understood as the meaning of the word itself, and, like a

hundred other particulars that should be noted in a contract, would unnecessarily encumber an ordinance.

Objection is also made to section 25 of the ordinance, that it does not specify the kind of stone to be used for macadamizing. If an ordinance in relation to waterworks should ordain that the water should be taken from "the river," I imagine it would not be contended that a discretion was conferred to take it from the Ohio or Missouri. Something must be assumed as generally known, or there would be no end to detail. It would have been easy for the ordinance to have named limestone, and yet everybody knows that there is no other macadamizing stone "that can be procured in the vicinity of the city." There is no more discretion in this regard left to the engineer than to any inspector. It is his duty to see that stone of the best quality is used "that can be procured," etc., and he is limited as much as can be done by ordinance.

Counsel rely mainly upon *Ruggles v. Collier*, 43 Mo. 353, and upon *City*, to use of *Murphy, v. Clemens*, *id.* 395. In the first case the Legislature had conferred upon the common council power to designate the streets to be repaved. This power the council sought to transfer to the mayor, which we held they could not do. In the other case the council had been authorized to build sewers and describe their dimensions by ordinance. Instead of doing this, it threw upon the city engineer the responsibility of determining both their size and material, and we held such a transfer of discretionary power to have been unauthorized. To the principle of those cases we adhere, but I do not find it involved in the case at bar. In those, every discretion intrusted by law to the common council was transferred to an executive officer. In this case the most that can be said is that the council undertook to do its duty, but performed it in an imperfect manner. If, as in *Ruggles v. Collier*, the council had given an executive officer the right to decide what particular street or part of a street shall be improved, or were there known and recognized modes of macadamizing or erecting curbstones, or of guttering macadamized streets, differing materially one from another either in the material used, or in the manner in



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State of Missouri, to use of Kearney, v. Dehlinger.

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which it is prepared and laid, and the choice between these modes had been left to the engineer, as was the size and material of the sewer in the City v. Clemens, we should be compelled to hold that the council had failed in its duty, and had intrusted to an executive officer an unwarranted discretion.

Counsel for defendants make no point concerning the effect given by the statute to the engineer's certificate of his assessment in making it "*prima facie* evidence," etc. Expressing no opinion as to how much or whether any more evidence should be required under the act of 1867, than under the one referred to in City, to use, etc., v. Bernoudy, 43 Mo. 552, and other cases, we are of opinion that the Circuit Court, at special term, committed no error in regard to the points presented to and considered by us; and, therefore, that its action at general term should be reversed. The other judges concur.

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STATE OF MISSOURI, TO THE USE OF THOMAS KEARNEY, Respondent, v. VICTOR DEHLINGER *et al.*, Appellants.

1. *Justices' courts — Complaint — Averments of, not controlled by title.*—The averments of a complaint before a justice, under section 19, p. 844, Wagner's Statutes, are not controlled by the title thereto, which may be treated as surplusage.

*Appeal from St. Louis Circuit Court.*

George E. Smith, for respondent.

E. P. McCarty, and Lackland, Martin & Lackland, for appellants.

CURRIER, Judge, delivered the opinion of the court.

The only point requiring attention in this record relates to the jurisdiction of the justice before whom the suit was originally brought. If the suit was commenced under section 19, chapter 82, article 8, p. 844, Wagner's Statutes (Gen. Stat. 1865, p. 721, § 19), for a failure on the part of the constable to return an execution according to its command, then the justice had

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State of Missouri, to use of Kearney, v. Dehlinger.

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jurisdiction; but if the suit was founded on a breach of the constable's bond, and is prosecuted under section 26 of the aforesaid article, then the justice had no jurisdiction of the subject-matter of the suit, since the claim exceeds ninety dollars.

The suit has been treated throughout as instituted by complaint and summons under the nineteenth section of the statute referred to. The objection to the jurisdiction appears for the first time in this court. There is no motion in arrest, nor is the point referred to in the motion for a new trial. The plaintiff filed with the justice a statement of his cause of action as pointed out in said nineteenth section, but prefixed thereto a title wherein the State of Missouri is designated as suing to the use of Thomas Kearney. From this circumstance the inference is sought to be drawn that the suit was brought upon the constable's bond, and consequently under said twenty-sixth section, which provides for such suit. But the complaint itself does not purport to be founded upon the bond. Neither the bond nor its condition is set out in the statement; nor is any breach of the bond alleged; nor is the State of Missouri referred to in the body of the statement. The statement treats Thomas Kearney alone as the party complaining, and the party to whom the right of action is alleged to have accrued. The complaint states a case under the nineteenth section, and its averments are not to be controlled by the title, which was wholly unnecessary, is not required by the statute, and may be treated as surplusage. We must look to the substance and body of the complaint for the cause of action sued upon, and thence determine whether that cause of action is grounded upon a breach of the bond, or is sought to be founded upon a liability existing independently of that instrument. As already observed, on looking into the complaint we find no statement of the terms and conditions of the bond, or any assignment of a breach of those terms and conditions. In a word, the complaint states no cause of action springing out of any alleged breach of the bond or its conditions. The complaint is founded upon the nineteenth section of the statute, and is therefore not subject to the objection taken against it.

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The State, to the use of Schnerr, v. Laies et al.

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No exception was taken to any action of the court at the trial, or prior thereto, and the judgment will be affirmed. The other judges concur.

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THE STATE, TO THE USE OF CONSTANTINE SCHNERR, Appellant,  
v. FELIX LAIES *et al.*, Respondents.

1. The exemption of property from attachment, provided by 1 Wagner's Statutes, 185, § 19, is purely a matter of statutory regulation. And whenever a defendant in attachment is about to remove out of the State with intent to change his domicile, the protection of the statute ceases, and all that he possesses is liable to attachment.

*Appeal from St. Louis Circuit Court.*

*Slayback & Haeussler*, for appellant.

The saving clause is evidently a dead letter, and is directly repugnant to the purview or body of the act, and can not stand without rendering the other provisions inconsistent and destructive of themselves. (1 Kent, 462; Plowden, 565; Gen. Stat. 1865, ch. 55, p. 603, § 9.)

*Jecko & Hospes*, for respondents.

WAGNER, Judge, delivered the opinion of the court.

This was a suit upon an official bond. The respondent was one of the constables of St. Louis township, and, as such, by three several writs of attachment issued from the office of a justice of the peace, against Schnerr, levied upon certain personal property mainly consisting of wearing apparel belonging to Schnerr and his family.

The ground stated in the affidavit for an attachment was that Schnerr was about to remove out of this State with intent to change his domicile. Schnerr claimed the property on the ground that it was exempt under the law from legal process, but the respondents held it until judgments were rendered, and then sold it under executions which were issued.

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The State, to the use of Schnerr, v. Laies et al.

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The trial was had before the court on an agreed statement of facts. And in addition to what has been above stated, it was admitted that the value of the property sold was \$500, and also that the facts averred in the affidavits, that Schnerr was about to remove out of the State with the intent to change his domicile, were true.

Plaintiff then asked the court to declare the law to be that if it found that the property in question was owned by the plaintiff when levied upon, and that he at the time was the head of a family; that the property levied upon was such as is mentioned in the ninth section of the act relating to executions, then plaintiff was entitled to judgment, and it made no difference whether at the time of the levy he was about to do any of the acts set out in the affidavits to the attachments. The court refused to make this declaration, and then rendered judgment for respondent.

There is but one single question presented for determination, and that is whether, under the circumstances, the property was exempt from attachment. By the ninth section of the law relating to executions, all wearing apparel of the family is exempted from levy and sale. (1 Wagn. Stat. 603, § 9.)

The attachment act specially enumerates what the officer shall be authorized to seize, as attachable property, but it is provided that "no property or wages declared by statute to be exempt from execution shall be attached, except in the case of a non-resident defendant, or of a defendant who is about to move out of the State with the intent to change his domicile." (1 Wagn. Stat. 185, § 19.)

The exemption is purely a matter of statutory creation, and has such force as the statute gives it, and no more. By the very terms of the law, whenever a person is about to remove out of this State with intent to change his domicile, the protection of the statute ceases, and all that he possesses is liable to attachment.

There is no error in the ruling of the court, and its judgment is affirmed. The other judges concur.

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Ticknor v. Voorhies.

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L. F. TICKNOR, Respondent, v. C. F. VOORHIES, Appellant.

1. *Practice, civil—Pleadings—Amended answer, etc.*—A defendant, by filing an amended answer and going to trial upon it, abandons his first answer and the matters therein alleged, which were not re-stated in the answer as amended.
2. *Practice, civil—Answer defective for indefiniteness.*—In a suit on a draft, the answer asserted that, by the laws of Louisiana, all right of action upon the draft sued on was extinguished prior to the institution of the suit. *Held*, that the answer was defective in failing to set out the facts which operated the extinguishment, and in failing to specify the laws relied on.

*Appeal from St. Louis Circuit Court.*

*Lucien Eaton*, for respondent.

*Voorhies & Mason*, for appellant.

CURRIER, Judge, delivered the opinion of the court.

On the 4th of March, 1869, the defendant filed an amended or supplemental answer, in which it is alleged that the "draft sued on was made and also to be executed under the laws of the State of Louisiana; that, by virtue of the laws of said State, all right of action, as against the defendant as the drawer of said draft, and all liability of defendant on account of said draft, were extinguished before this suit was brought."

These averments are put in issue by the plaintiff's replication, and upon these issues the parties went to trial December 22, 1869. The plaintiff recovered, and the defendant brings the cause here by appeal, desiring a review of the case as made by his original answer, as well as upon the issues raised by his amended or supplemental pleading.

The statute (Wagn. Stat. 1035, § 13) provides as follows: "In every petition, answer, or reply, amendatory or supplemental, the party shall set forth in one entire pleading all matters which, by the rules of pleading, may be set forth in such pleading, and which may be necessary to the proper determination of the action or defense." Under this statute the defense must be confined to the matters alleged in the defendant's final pleading. By filing this pleading and going to trial upon it, he abandoned his



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Seaman v. Johnson.

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first answer and, the matters therein alleged, which were not restated in the answer as amended. (Young v. Woolfolk, 33 Mo. 110; *id.* 244; 28 Mo. 39.) This puts out of the case the question made upon the defendant's affidavit for a continuance. The testimony of the absent witness, as disclosed in the affidavit, had no relevancy to the issues made by the amended pleadings. The motion for a continuance, founded upon that affidavit, was therefore properly overruled.

The amended answer itself is vague and indefinite, and alleges matters of law rather than of fact. It asserts that, by the laws of Louisiana, all right of action upon the draft sued on was extinguished prior to the institution of the suit; but from what cause does not appear, whether by lapse of time or for some other reason. The facts which are supposed to operate the extinguishment under the Louisiana code are not set out or alluded to. The record, moreover, fails to show what the Louisiana laws are upon which the defendant relies. They were in issue, and were to be proved like other facts, but the evidence of their existence is not found in the record.

The appeal is without merit, and the judgment will be affirmed. The other judges concur.

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CLEMENT M. SEAMAN, Respondent, v. BEN. JOHNSON, Appellant.

1. *Practice, civil—Actions—What will lie at law between partners.*—An action will lie at law by a partner against his co-partner, without a settlement of partnership accounts, for money received by the latter as plaintiff's agent and credited to him in an account disconnected with the affairs of the firm.

*Appeal from St. Louis Circuit Court.*

H. N. Hart, for appellant.

Davis & Bowman, for respondent.

CURRIER, Judge, delivered the opinion of the court.

This suit is brought to recover moneys alleged to have been received by the defendant to the plaintiff's use, and for the value

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Seaman v. Johnson.

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of goods sold. One count charges that the defendant is indebted to the plaintiff in the sum of \$978 for moneys had and received by the defendant to the plaintiff's use. The answer does not specifically deny the receipt of the money, but denies the alleged indebtedness. Whether this mode of pleading put the plaintiff's claim in issue, it is not necessary to inquire. A trial was had upon the merits, which resulted in a verdict and judgment for the plaintiff; and the defendant brings the case here by appeal. The questions sought to be raised by the appeal spring out of the action of the court in giving and refusing instructions. No instructions were given for the plaintiff, and those asked by the defendant were refused. The court, however, upon its own motion, gave an instruction embodying the principle contended for by the defendant, a clause being added to present a further aspect of the case. It directed the jury that if the "plaintiff and defendant were part owners of the steamboat 'Only Chance,' and the account sued on accrued while they were such part owners, and the affairs of such partnership were unsettled, then the plaintiff could not recover, unless the jury further found that the defendant received the amounts sued for as the agent of plaintiff, and so credited the plaintiff, upon a separate account by him stated, as the plaintiff's agent." The jury appear to have found the facts hypothecated in the closing part of the instruction, and returned a verdict for plaintiff accordingly.

There was some evidence on which to base that part of the instruction which referred to the supposed agency, and the finding of the jury on that subject is conclusive. If the defendant received the moneys sued for as the plaintiff's agent, and credited them to him in an account disconnected with the affairs of the boat, according to the hypothesis of the instruction, and as the jury must have found, there can be no doubt that an action for the moneys so received and set apart is sustainable at law. The evidence bearing upon this branch of the case seems slight, but we can not undertake to estimate its weight or value. That was the business of the jury.

The judgment must be affirmed. The other judges concur.

ISAIAH POE *et al.*, Appellants, v. ANTOINE DOMINIC *et al.*,  
Respondents.

1. *Practice, civil*—*Appeal can not be taken on mere voluntary non-suit.*—  
Plaintiff has no right of appeal upon a mere voluntary non-suit, to which he  
was not driven by any action of the court below.

*Appeal from Second District Court.*

*L. Brown*, for appellants.

*Jones & Davis*, for respondents.

BLISS, Judge, delivered the opinion of the court.

This cause was commenced in the Cape Girardeau Court of Common Pleas, and, by change of venue, transferred to the Circuit Court of the same county. The order of transfer was made upon motion of one of the defendants, and opposed by the plaintiff, who afterwards appeared in the Circuit Court, and, claiming that the proceedings in making the change were irregular, moved to remand the case. The court overruling the motion, he suffered a voluntary non-suit, and, having moved to set it aside, appeals.

This is a mere voluntary non-suit, to which the plaintiff was not driven by any action of the court below, and the judgment is affirmed.

“It is only where the action of the court on the trial is such as to preclude the plaintiff from a recovery that it is proper to suffer a non-suit. In no other case will this court interfere, as has been decided again and again.” (*Hageman v. Moreland*, 33 Mo. 86; see also *Layton v. Riney*, *id.* 87; *Schulter v. Bockwinkle*, 19 Mo. 647; *Dumey v. Schoeffler*, 20 Mo. 323.) The other judges concur.

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Schafroth, Adm'r, v. Ambs et al.

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WILLIAM SCHAFROTH, ADMINISTRATOR, ETC., Plaintiff in Error,  
v. PETER AMBS AND WIFE, Defendants in Error.

1. *Married women — Separate estate of, subjected to payment of their separate debts.*—A *femme sole* may acquire by purchase as well as by gift a separate estate, and that, too, through a deed directly to herself, without the intervention of trustees; and such separate estate will be protected in equity against the marital rights of an after-taken husband who shall acquiesce in the arrangement and allow his wife to manage and control the property as her own, notwithstanding such marriage. Equity will also subject such estate to the payment of her debts and obligations. Where she joins in the execution of a note, it will be inferred, *prima facie*, that she intended thereby to charge her separate estate. Equity will protect the separate interests of a married woman against the claims of her husband and his creditors, but will subject such property to the payment of her own debts.
2. *Married women — Separate estate of, charged by direct proceedings in chancery.*—Where a married woman joins her husband in the execution of a note, the first and only method of charging her separate estate for the debt is a resort to chancery. The jurisdiction of chancery in such a case is in no way dependent upon antecedent legal proceedings against her husband, or those of any kind whatever.

*Error to St. Louis Circuit Court.*

*Sharp & Broadhead*, for plaintiff in error.

I. In equity, no trustee need be named; none is necessary, whether the separate property was acquired before or during coverture, or whether the property be real or personal. (Tyler on Inf. and Cov. 431; 2 Sto. Eq. Jur., §§ 1380-4; Fears v. Brook, 12 Ga. 196, and cases cited; Newland v. Paynter, 4 M. & Cr. 408; Tullet v. Armstrong, *id.* 390; Shirley v. Shirley, 9 Paige's Ch. 363; Hamilton v. Bishop *et al.*, 8 Yerg. 33; 2 Kent, 162, and note; Bennett v. Davis, 2 P. Williams, 316; Clancy on Married Women, 256-7; 2 Rop. on Husb. and Wife, 152, 183; Freeman v. Freeman, 9 Mo. 772; Hill on Trustees, 585, and note *m*; *id.* 609.)

II. It being expressly averred in the petition and admitted by the demurrer that she did acquire, use, enjoy, and possess the property as her sole and separate estate; she possessed, as a necessary incident to such an estate, full power in equity to charge, pledge, and encumber it with the debt sued on—the

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Schafroth, Adm'r, v. Ambs et al.

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instrument creating the trust not restraining her from exercising the full dominion of owner. (Whitesides v. Cannon, 23 Mo. 457; Claflin v. Van Wagoner, 32 Mo. 252; 2 Rop. Husb. and Wife, 245.)

III. This term, "sole and separate use," is the proper technical phraseology universally recognized and adopted by conveyancers for the purpose of designating the exclusion of the marital rights. (Clancy on Married Women, 263; *ex parte* Ray, 1 Madd 119; 2 Rop. on Husb. and Wife, 158; Hill on Trustees, 420; 2 Sto. Eq., § 1382; Wells v. Sayers, 4 Madd. 409.) The authorities draw no distinction between the cases of married and single women as to the words necessary to create the separate estate, and indeed, in reason, none can be drawn. (Clancy on Married Women, 261.)

IV. But, moreover, the petition alleges Mrs. Ambs to have, as a matter of fact as well as law, held, used, and enjoyed the property as her separate estate, both she and her husband treating it as such; and even if she had not acquired it as her separate estate by the conveyance, the husband and wife treating the property as the wife's separate estate would give her the right of disposition claimed. (Caldwell v. Renfrew, 33 Verm. 213; Tyler on Inf. and Cov. 432.)

V. The principle that one claiming equitable relief must exhaust his remedies at law before he can come into equity, is applicable only to cases where the claim is legal but the legal remedies are insufficient. But in the case at bar, the jurisdiction of the court of equity is asserted upon the ground that the defendant, Katharina, is a married woman with a separate estate, which she has charged.

*Clover*, for defendants in error.

I. The bill or petition, as a proceeding in equity, is wholly insufficient to entitle the plaintiff to the aid and interposition of a court of equity. It fails to allege a suit upon the note as to Peter Ambs, maker, or judgment or execution, or return of execution *nulla bona*, or of anything else to give plaintiff a standing in a court of equity.



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Schafroth, Adm'r, v. Ambs et al.

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II. A married woman is not chargeable upon her note executed when covert, either in law or equity, either out of her general or separate estate, unless the note on its face shows and expresses an intention to charge her separate estate, or it is alleged in the bill and proven that the consideration for her indebtedness was incurred for the benefit of her separate estate.

CURRIER, Judge, delivered the opinion of the court.

The competency of a married woman to bind her separate property, by giving notes and other obligations, can no longer be regarded as an open question in this State, however unsettled the doctrine may be elsewhere. As to her separate property, she is here regarded as a *femme sole*, and, as to that, competent to make contracts which a court of equity will enforce, not against her personally, but against her separate estate; and not only so, the contract itself, as, for instance, a promissory note, is evidence of her intention to charge such property. It is sufficient *prima facie* evidence to establish the existence of such intention, without the introduction of other proofs. This court so decided in *Coats v. Robinson*, 10 Mo. 757, Judge Napton delivering the opinion of a majority of the court.

The whole subject was again reviewed at great length by Judge Leonard, and with his usual ability, in *Whitesides v. Cannon*, 23 Mo. 457, where the doctrine of the prior decision was re-stated and re-affirmed in its whole extent. The same questions were again brought up in *Claffin v. Van Wagoner*, 32 Mo. 252, and the court treated them as fully settled by the previous adjudications.

We are not disposed to go behind these decisions for the purpose of ascertaining what may be the state of the law on this subject in other States and countries. There are doubtless conflicting decisions and opposing authorities. Here, however, the decisions have been uniform and consistent, and establish not only a clear and intelligible rule, but one that is, on the whole, satisfactory. Its disturbance at this time would be both inexpedient and unwise.

In the case at bar it is claimed, however, that the petition fails to show that the estate sought to be subjected is in fact the

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Schafroth, Adm'r, v. Ambs et al.

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separate property of the defendant, Mrs. Katharina Ambs. The petition is demurred to chiefly on that ground. The petition avers and the demurrer admits that the property in question was conveyed to Mrs. Ambs prior to her intermarriage with the other defendant, Peter Ambs, "for her sole and separate use;" that she has "ever since owned, held, and enjoyed said property as her own separate estate," and that the "same is still so owned, held, and enjoyed by her."

It thus stands admitted by the pleadings, not only that the property was originally conveyed to Mrs. Ambs for her sole and separate use, but also that it has ever since been so held and treated, notwithstanding her subsequent intermarriage with the other defendant. It thus seen that, so far as the mere words of a conveyance are competent to express and describe a separate estate, such an estate was created by the conveyance to Mrs. Ambs, and that the subsequent use and treatment of the property has conformed to the character of the estate sought to be created by the deed. As to what words are appropriate and efficient to describe a separate estate, see 2 Sto. Eq. Jur., § 1382.

It is objected, nevertheless, that the petition fails to show that, in the deed to Mrs. Ambs, trustees intervened to take the legal title. It is therefore argued that no separate estate was created by that instrument. The argument assumes that trustees were necessary for that purpose. The assumption is not well founded. A separate estate may be created without the intervention of trustees. Judge Story says that it has been settled for a hundred years that in equity the intervention of trustees in the creation of a separate estate in the *femme* is unnecessary, although the employment of trustees in the creation of such estates is conceded to be the better method of doing it. He then proceeds to say that "whenever real or personal property is given or devised, or settled on a woman, either before or after marriage, for her separate and exclusive use, without the intervention of trustees, the intention of the parties shall be effectuated in equity, and the wife's interest protected against the marital rights of the husband." (*Id.*, § 1380.) Hill states the doctrines thus: "Real estate limited to the separate use of a married woman is more

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Schafroth, Adm'r, v. Ambs et al.

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usually and properly secured to her by vesting it in trustees. This, however," he proceeds to say, "is not absolutely necessary, and if there be a clear trust for the use of the *femme*, although the property be given to her directly without the intervention of trustees, and the husband thus becomes entitled at law, equity will consider his conscience affected by the direction, and will treat him as a trustee for his wife." (Hill on Trust. 585, 2d Am. ed.; and see the numerous authorities cited in support of the text.) And this doctrine applies although the gift or bequest be to an unmarried woman, and although such gift be made without reference to an immediate marriage, and not as a provision for that event. In such a case a subsequent husband is deemed to adopt the property in the state in which he finds it upon the occurrence of the marriage, in the absence of any expressed dissent or disagreement to the contrary. (2 Sto. Eq. Jur., § 1384, and authorities there cited.)

In the case before us, as already remarked, the pleadings not only admit that Mrs. Ambs originally acquired the property to her separate use, but also that she has ever since enjoyed that use, and controlled and enjoyed the property as her own, notwithstanding her subsequent intermarriage with the other defendant. This excludes the idea of the existence of any arrangement between him and his wife inconsistent with her separate interest in the property. A distinction, however, is sought to be drawn between an estate acquired by gift, bequest, or devise, and an estate acquired by purchase. The case does not show how Mrs. Ambs acquired this property, whether by deed of gift or upon a pecuniary consideration moving from herself. It simply shows that it was conveyed to her, but upon what consideration or inducement does not appear. But I do not find that the distinction referred to has been recognized in the books. In Clancy's treatise on the rights of husband and wife, it is said that although the decided cases furnish no instance of the acquisition of separate estates except by gift or bequest, still the principle involved would doubtless "equally apply to every form by which such a limitation can be made"—that is, to every form or method of limitation to the separate use of the *femme*. (Clancy on Husb.

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Schafroth, Adm'r, v. Ambs et al.

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and Wife, 261, 3d London ed.) The decided cases disclose limitations of property to the separate use of the *femme*, in instances of gifts and bequests, because it is in such instances that the limitation usually occurs, and not, it is apprehended, because such limitations are necessarily incompatible with a deed of purchase. No sufficient reason is perceived for denying to a *femme sole* the right to do for herself what others are at perfect liberty to do for her. If she makes provision for a separate and independent estate, free from the interference of a possible future husband, and such husband makes no objection, who else has any right to complain?

Formerly it was supposed that the intervention of trustees was necessary in the creation of a separate estate in the wife, but that notion has now become obsolete. Then a distinction was sought to be drawn between gifts and bequests to married and unmarried women as regards the creation of a separate estate, but that distinction has been repudiated by the courts. It does not appear that any distinction has ever before been attempted to be drawn between the different methods of creating the separate estate, whether by bequest, deed of gift, or deed of purchase.

In the case under consideration there was not only the creation of a separate estate, so far as the employment of apt technical terms in the deed is concerned, but it appears by the pleadings that there has been an uninterrupted use and enjoyment of the separate estate thus sought to be created, ever since the execution of the deed, no objection on the part of the after-taken husband appearing. His acquiescence and approval rather should be inferred from the facts alleged.

It was decided in *Coughlin v. Ryan*, 43 Mo. 99, that where the wife held a leasehold at the time of her marriage, and her husband permitted her to hold and enjoy the property and to collect and apply the rents and profits to her own use, she paying the taxes, the accumulation of such rents and profits, upon her decease, would descend to her heirs as her separate estate, in opposition to the marital rights of her husband. So, it was decided in Vermont that where personal property was held and treated by the husband and wife as the separate estate of the latter, her

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Schaefroth, Adm'r, v. Ambs et al.

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separate rights therein would be recognized as well at law as in equity, and that such property is the proper subject of a *donatio causa mortis* to her husband in trust for third parties. (Caldwell v. Renfrew, 33 Verm. 213; and see Tyler on Inf. and Cov. 432.) Bauer v. Bauer, 40 Mo. 61, is inapplicable to the facts and law of this case. There the wife simply held the premises in fee, without any attempt being made to create in her a separate estate which should exclude the marital rights of her husband. But a separate estate is that which does exclude such rights. It is an estate which belongs to the wife alone, and over which her husband has, in equity, no right or control.

We deduce from the authorities the following conclusions:

1. That a *femme sole* may acquire by purchase as well as by gift, a separate estate, and that, too, through a deed directly to herself, without the intervention of trustees; and that such separate estate will be protected in equity against the marital rights of an after-taken husband who shall acquiesce in the arrangement and allow his wife to manage and control the property as her own, notwithstanding the marriage. 2. That equity will also subject such estate to the payment of her debts and obligations. Where she joins in the execution of a note, it will be inferred that she intended thereby to charge her separate property, without further proof, in the first instance, of such intention. Equity protects the separate interests of a married woman against the claims of her husband and his creditors, but not against the just claims of the creditors of the married woman herself. On the other hand, as already suggested, it will subject such property to the payment of her own debts and vindicate the rights of those with whom she contracts.

The further point is made that it does not sufficiently appear that the plaintiff has exhausted his legal remedies against the husband, who is a joint maker of the note which is sought to be made good out of his wife's separate estate. The petitioner avers that he has no property whatever, and that fact is admitted by the demurrer. It is not at once perceived what legal redress a creditor can have against a debtor who is destitute of all means of payment. However that may be, this is not a case where the



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The St. Louis Gaslight Co. v. The City of St. Louis.

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doctrine in regard to the exhaustion of legal remedies applies. This is an equitable proceeding to subject the separate estate of Mrs. Amb's to the payment of her note, by the execution of which she is presumed to have intended a charge upon such separate property. As against this property the plaintiff had no legal remedy. The jurisdiction of chancery to subject it to the payment of her debts is in no way dependent upon antecedent legal proceedings of any kind. The plaintiff never had any legal remedy against Mrs. Amb's or her property. His first and only remedy was in chancery.

As a result of the foregoing views, the judgment will be reversed and the cause remanded. The other judges concur.

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THE ST. LOUIS GASLIGHT COMPANY, Appellant, v. THE CITY OF  
ST. LOUIS, Respondent.

1. *Contracts — Latent ambiguity — In contract of doubtful meaning, construction of, as shown by continued conduct of parties, should prevail over that given by court.*—In the use of words of doubtful meaning or application, the meaning and application given by the parties who used them should prevail over an interpretation that might otherwise be given by the court. In the interpretation of contracts of this sort, regard should not be had to loose declarations, or equivocal or isolated acts; but the continuous conduct of the parties for a series of years concerning the subject-matter of the contract, and in fulfillment of its conditions—every act pointing in the same direction—is properly admissible in evidence. And the rule embraces acts subsequent to the date of the contract, and includes deeds and instruments under seal.
2. *City ordinances, designed for a city at large, apply to its enlarged boundaries.*—A city ordinance, or a city contract designed for a city at large, operates throughout its boundaries, whatever their change.
3. *St. Louis Gas Company — Contract for gas — Gas furnished St. Louis in extended limits — Estoppel.*—In suit by the St. Louis Gaslight Company against the city of St. Louis, for amount claimed as due for gas furnished defendant in its enlarged boundaries, where it appeared that without dispute, and for a long series of years, plaintiff had claimed and exercised, and been supported in, the exclusive right of occupying, under a certain contract, the new as well as old city limits, *held*, that it should be estopped from seeking to limit its operation for the purposes of the suit.

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The St. Louis Gaslight Co. v. The City of St. Louis.

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*Appeal from St. Louis Circuit Court.*

On the 9th day of January, A. D. 1846, under the provisions of the original and amended charter of the St. Louis Gaslight Company, a contract in writing was entered into between the city of St. Louis and said Gas Company, which embraced among others the following provisions:

"The party of the first part do agree with the party of the second part that they will and do, under the provisions of the twenty-sixth section of the St. Louis Gaslight Company's charter, hereby order and contract for the erection of five lamps on each square or block within that part of the city of St. Louis bounded as follows: On the east by Front street, on the west by Fourth street, on the north by Cherry street and Franklin avenue, and on the south by Myrtle street, together with an equivalent number of lamps on the west side of Fourth street, as will complete the lighting of said street from Myrtle street to Franklin avenue."

\* \* \* \* \*

"And the party of the second part do hereby agree and bind themselves and their successors to furnish, in the shortest practicable time, to the party of the first part, in addition to the lamps hereby ordered, such additional lamps as may be ordered (from time to time) by the party of the first part, six months' notice being given to the party of the second part of the required extension: *provided*, that the extension required from time to time shall net to the party of the second part, upon the cost thereof, six per cent. per annum, which is hereby guaranteed by the party of the first part, provided the cost aforesaid shall be certified to by affidavit of the president of the aforesaid Gaslight Company.

"*Second.* That the party of the second part do agree, under the twenty-sixth section of said charter, to erect and keep in repair such public lamps or burners in the streets or other public places within the city of St. Louis as are hereby contracted for and may be hereafter ordered under the provisions of said charter; and the said party of the first part agree to pay to the said party of the second part, for the gas used and consumed by

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The St. Louis Gaslight Co. v. The City of St. Louis.

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each public lamp or burner, of an illuminating power equal to the gaslight of any other city in the Union, herein ordered by the party of the first part, and erected by the party of the second part, the sum of twenty-five dollars per annum, to be paid in quarterly payments; said lamps to be kept burning, commencing during twilight in the evening and ending at dawn of day in the morning, except when the clear moonlight renders it unnecessary; the party of the first part lighting, extinguishing, cleaning, and making such repairs, other than such as result from natural wear and tear, to said lamps, posts, or brackets herein or hereafter to be ordered: *provided*, that the sum of twenty-five dollars per annum for each lamp herein ordered shall be in full of all demands against the said party of the first part, for gas, furnishing lamps, lamp-posts or brackets, and gas pipes, and the cost of laying and erecting the same, and the interest on the cost thereof, anything in the twenty-sixth section of said charter of the St. Louis Gaslight Company to the contrary notwithstanding: *provided further*, that the city in no case shall pay to the party of the second part a sum greater than a majority of the private consumers are paying for gas.

“*Third.* The said party of the second part agree to erect one-half of the lamps herein contracted for within one year, and the remaining half within two years, from and after the first of October, 1846.” \* \* \* \*

\* \* \* \*  
“*Fifth.* The party of the first part agree and do hereby relinquish the right to purchase the gas-works, property etc., of the Gaslight Company at the expiration of twenty years from and after the first of January, 1840, as provided by the twenty-seventh section of the charter of said company: *provided*, that in the event the said party of the first part shall decline to purchase the gas-works, property, etc., at the end of twenty-five years from and after the first of January, 1840, as is provided in the twenty-eighth section, they shall have the privilege of purchasing, as aforesaid, at the end of thirty years, from and after the first day of January, 1840, and at the period of every five years thereafter, in the manner as is provided in the twenty-seventh and

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The St. Louis Gaslight Co. v. The City of St. Louis.

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twenty-eighth sections, and upon giving notice of intention so to purchase, as is provided in section 28 of said charter." \* \*

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"*Eighth.* It is mutually agreed between the parties aforesaid that the second party may, at any time on or before the first of October, 1846, cancel the preceding provisions of this contract by giving notice to that effect, in writing, to the mayor: *provided*, that in such case the said second party shall, and they do, hereby bind themselves to surrender all exclusive privileges of lighting the city under their charter.

"*Ninth.* That the parties to this instrument do mutually absolve each other from the conditions contained in a former contract, dated 8th of January, 1841, in reference to the lighting of the city of St. Louis with gas: *provided, however*, that unless the said company shall go on in good faith to fulfill the terms of this contract, all penalties accruing under the former contract shall be and continue in force."

It was admitted, partly by pleadings and partly by stipulations on the trial, that the total number of lamps ordered and erected in the city limits described in the contract, and in the time therein allowed, was 263; also, that subsequent to the erection of the above 263 lamps, the city did from time to time order, and the Gas Company did from time to time erect, large numbers of additional lamps on other streets and in other parts of said city not embraced within the district so specified in said contract; and that the total number of lamps erected by said company and in use by the city, and for the gas used in which the city was responsible to the Gas Company, at the several dates mentioned in the petition, was as follows: during the quarter ending April 30, 1866, an aggregate of 2,095 lamps, viz: 263 lamps within the district specified in said contract, and 1,832 lamps outside of that district; during the quarter ending July 31, 1866, 263 lamps within and 1,999 lamps outside of said district—in all 2,262 lamps; during the quarter ending October 31, 1866, 263 lamps within and 2,196 lamps outside of said district—in all 2,459 lamps.

*Glover & Shepley*, and *Krum* and *Hitchcock*, for appellant.

I. Taking the whole contract of January, 1846, together, the meaning of the words "herein ordered," used therein, is perfectly clear and unambiguous, and they should be applied only to lamps erected within the district particularly described in the beginning of the contract.

II. For evidence of a latent ambiguity to be admissible, it must be made out clearly. (Sugd. on Vend. 140; 2 Phillips on Ev. 750; *Smith v. Jeffries*, 15 M. & W. 561; *Walpole v. Cholmondeley*, 7 T. R. 138.)

III. The term "herein ordered" being perfectly clear in meaning, and without ambiguity, latent or patent, parol evidence was inadmissible to show the intention of the parties using it, either directly or indirectly. (1 Greenl. on Ev. 277-8, 295; 2 Phillips on Ev. 233-4; 2 Stark. on Ev. 563, 566; 2 Pars. on Cont. 564; *Chit. on Cont.* 106; *Shore v. Wilson*, 9 Cl. & Fin. 566 *et seq.*; *Cortelyou v. Van Brundt*, 2 Johns. 362; *Clifton v. Walmesley*, 5 T. R. 289; *Meres v. Ansell*, 3 Wils. 276; *Allen v. Kingsbury*, 16 Pick. 238; 7 Greenl. 423.)

IV. Even if the term "herein ordered" were ambiguous, as alleged, whether the ambiguity were patent or latent, the court erred in admitting evidence of the actions of the parties subsequent to the contract, to show their intention in using words contained in said contract. Such evidence is admissible only in the case of ancient deeds, grants, etc. (Sugd. on Vend. 1404; Stark. on Ev. 629; 2 Saund. Pl. and Ev. 697; *Chit. on Cont.* 106; *Munro v. Taylor*, 8 Hare, 56; *Simpson v. Margitson*, 11 Ad. & El., N. S., 32; *Baynham v. Guy's Hospital*, 3 Ves. 298; *Moore v. Foley*, 6 Ves. 237; *Livingston v. Ten Broeck*, 16 Johns. 14; *Allen v. Kingsbury*, 26 Pick. 228; *Parsons v. Miller*, 15 Wend. 561; 2 Phillips on Ev. 672 *et seq.*, and note p. 526.)

V. The words "herein" and "hereafter," throughout the second clause, are in such direct antithesis to each other that it would be impossible to give defendant's construction to "herein" without striking out "hereafter" wherever it appears in the contract. This would be to vary the contract, not to construe it,



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The St. Louis Gaslight Co. v. The City of St. Louis.

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and would be beyond all precedents. Parol evidence can in no case be allowed to take from or add to the language of a written instrument.

VI. Parol evidence of the acts of the parties under the contract being inadmissible, and the question being upon the construction of the terms of a written instrument bared of all extraneous circumstances, it was for the court, and not for the jury, to give the meaning of the terms in question as used by the parties. (Sugd. on Vend. 141; 2 Pars. on Cont. 492, 556, note *b*; Caldwell v. Dickson, 26 Mo. 61; Belt v. Goode, 31 Mo. 128; Simpson v. Margitson, 11 Ad. & El., N. S., 32; Eaton v. Smith, 20 Pick. 156; Hutchinson v. Bowker, 5 Mees. & Ed. 540; Browne v. Holton, 9 Ired. 327; Wason v. Rowe, 16 Verm. 528; Hitchin v. Groom, 5 C. B. 519; Begg v. Forbes, 30 Eng. L. & Eq. 508; Allen v. Kingsbury, 16 Pick. 239.)

*Geo. P. Strong*, for respondent.

I. The proper construction of the language of the contract, when all its provisions are duly considered, supports the claim of the city as to its proper meaning. Such was the manifest intent of both parties as to the meaning the contract should have, and this intent is to govern in the construction of the contract. (2 Sto. on Cont., §§ 634, 636, 640, 441 *a*, 640 *b*, 657, 658 *a*; Bell v. Bruen, 1 How. 187-8; Sumner v. Williams, 8 Mass. 162, 213, 214; Warren v. Merrifield, 8 Metc. 93, 95.)

II. Such is the construction which the parties themselves have put upon the contract by an unvarying practice of more than twenty years. The acts of the parties furnish a legitimate and often the most satisfactory mode of determining the meaning of the terms they have used in their contracts. (Chapman v. Bluck, 5 Scott, 530, 533; 5 Watts & Serg. 122; Chit. on Cont. 89; Warren v. Merrifield, 8 Metc. 266; Patterson v. Combden, 25 Mo. 13, 21, 22; Wilcox v. Bowles, 1 La. Ann. 230; Parrott v. Wickoff, *id.* 235; Fowle v. Bigelow, 10 Mass. 379, 392; Wagley v. Bayliss, 5 Taunt. 752; Cambridge v. Lexington, 17 Pick. 228-30; Livingston v. Ten Broeck, 16 Johns. 22.)

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The St. Louis Gaslight Co. v. The City of St. Louis.

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BLISS, Judge, delivered the opinion of the court.

The plaintiff complains chiefly of the instruction to the jury in relation to the construction of the contract between it and the city, and claims, first, that the language of the contract is plain and unequivocal, and not subject to the construction sought to be put upon it by the defendant; second, that it was the duty of the court to construe it, and that that duty could not be thrown upon the jury; and, third, that it was improper, in order to ascertain the meaning of the contract, to consider the subsequent acts of the parties in relation to it in order to ascertain the construction which they themselves had put upon it.

Ordinarily, when there is any uncertainty in the terms of a contract, it is the duty of the court to declare its meaning. When it is so plain that only one meaning can be attached to it, it admits of no construction, and that meaning must be enforced. To give it any other would be making, rather than interpreting, a contract. Assuming that there is sufficient doubt as to the meaning of this agreement to admit of construction, I will first consider the question whether the court was bound to construe it from its language alone, or whether the action of the parties might be inquired into in order to ascertain the construction which they put upon it for themselves; in a word, whether, in the use of words of doubtful meaning or application, the meaning and application given them by the parties who used them shall prevail over an interpretation that might be given by the court. It seems to me that the statement of the question should carry with it the proper answer. It has nothing to do with the old question of the admissibility of evidence to contradict or vary a written agreement. The law upon that matter has been too long and well settled to be subject to any doubt whatever, and the position taken by the Circuit Court in its instruction to the jury does not involve its consideration. Nor is it the same question that so often arises when evidence is offered to explain a latent ambiguity, though it has a strong analogy to it.

Our daily experience impresses us with the imperfection of common language and shows the errors into which we constantly

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The St. Louis Gaslight Co. v. The City of St. Louis.

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stumble in the use of the most important medium we possess for the communication of ideas. Such is the indefiniteness of words and phrases in daily use, and of so many meanings and shades of meaning are they susceptible, according to their arrangement, application, figurative or provincial use, or the different ideas attached to them by different persons, or by the same persons on different occasions, that no science or special art can be taught and no mechanical occupation can be prosecuted without the precision of technical terms and phrases. And if simple words and phrases so fail to communicate ideas with accuracy and precision, so much the more may parties to a long and complicated agreement not only fail to understand it alike, as is shown by every day's dispute, but if they agree in its meaning they may give it an interpretation differing from that which a court accustomed to greater precision of language would consider the most natural. In a case of that kind, whose interpretation should prevail? If the court gives one differing from that understood by the parties, it in effect makes a new agreement—the very thing most to be avoided. If it leaves the parties to be governed by their understanding of their own language, it in effect enforces the contract as actually made. That they should be so permitted to construe their own agreement, accords with every principle of reason and justice.

It is true that evidence of such understanding should not be entertained when the language is clear and will admit of but one interpretation, because in that case, unless there is fraud or mistake, the language used is the best possible evidence of the intention. Nor should any regard be paid to loose declarations or equivocal or isolated acts, but the continuous conduct of the parties for a series of years concerning the subject-matter of the contract, and in fulfillment of its conditions—every act pointing in the same direction—may make their understanding as clear as by the greatest precision of language.

In *Patterson v. Camden*, 25 Mo. 13, certain partners published a notice of dissolution, with notice that a new firm, composed of part of the members of the old, would collect the dues and pay the debts. The new firm drew a bill in the name of the old firm

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The St. Louis Gaslight Co. v. The City of St. Louis.

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to pay certain debts, and the court below had held that the written terms of the dissolution did not warrant the act. In view of that holding, this court declined to give a construction to the words of the notice, and said: "The practical construction of the notice given by the parties themselves, or the acts of the parties in regard to the subject-matter under the notice, may be properly looked to, properly taken into consideration, in order to ascertain what meaning the parties intended to attach to the instrument. \* \* \* This practical construction given by the parties themselves is a proper guide to its meaning, and is of more importance than what is the abstract meaning which this court may attach to its mere phraseology."

The court quote, as authority, *Whitehead v. Bank of Pittsburg*, 2 Watts & Serg. 172, which is a very similar case; and a certain construction was there given by the court to the article of dissolution, because the parties themselves had by their acts given it that meaning, the judge remarking: "I know of no better mode of ascertaining this meaning than is shown, if all parties acted on a particular meaning."

In *Chapman v. Bluck*, 5 Scott, C. P., 515, it became material to determine whether certain correspondence between landlord and tenant was a lease or only an agreement to lease; and the court not only considered the correspondence making the alleged demise, but also subsequent acts and declarations of the tenant acknowledging the relation of tenancy by promising to pay rent. Tindal, J., before considering these acts, says: "But we are also at liberty to look at the acts of the parties, than which there can not be a better means of ascertaining their intention." And Parker, J., after laying down the general rule as given by Lord Ellenborough, "that the intention of the parties, as declared by the words of the instrument, must govern the construction," adds that "subsequent acts and declarations of the parties may be looked to in aid of the construction."

Most of the instances where resort is had to acts, etc., in aid of construction, are found in cases where the meaning and application of words in old grants, in the location of highways, etc., are controlled by the signification attached to them for a series of

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The St. Louis Gaslight Co. v. The City of St. Louis.

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years by the parties or by those interested. Thus, in *Wadley v. Bayliss*, 5 Taunt. 782, in relation to the enjoyment of a right of way under an old award, the court held that "the language of the award being ambiguous, it was competent to go into evidence of the enjoyment had, in order to see what was the meaning of those who worded it." And in *Livingston v. Ten Broeck*, 16 Johns. 15, the usage of the parties under a deed was held admissible to explain its terms.

I do not understand that there is any dispute in relation to this right of explanation as to ancient grants; but the plaintiff contends that it is confined to them, and, in case of all other contracts, that the court alone can construe them, and, in making such construction, is confined to their language. To sustain this view, many cases are cited, but special attention is called to *Parsons v. Miller*, 15 Wend. 561. Justice Savage there says that "deeds are to be expounded by their terms where there is no ambiguity;" and says further, that "the cases cited by Mr. Justice Spencer, in *Livingston v. Ten Broeck*, show that the evidence (usage of parties) is proper only in case of ancient deeds." But if the justice means by ancient deeds those that are over thirty years old, he is certainly mistaken, for the very deed that in *Livingston v. Ten Broeck* was construed by the acts of the parties, was executed less than twenty years before the trial. The age of the deed has nothing to do with the principle involved in the question, only sufficient time must have elapsed to enable the continued acts of the parties to have given it an unmistakable construction.

Though I have found no case where the court has refused to explain an ambiguity by the unequivocal conduct of the parties, yet there seems to have been a timidity—a disposition to qualify the cases that would permit a resort to such explanations—a reluctance to depart from the old rule, that patent ambiguities can only be explained by the instrument itself. Phillips (Ev. 804) says that covenants are not to be construed by the acts of the parties, and a note to *Fowle v. Bigelow*, 10 Mass. 379, says the same. But I find the cases referred to (*Baynham v. Guy's Hospital*, 3 Ves. 295, and others) arose upon covenants



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The St. Louis Gaslight Co. v. The City of St. Louis.

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in leases where a perpetual renewal was claimed. In the case named, the Master of the Rolls says that "the courts in England, at least, bear against construing a covenant to be for a perpetual renewal, unless it is perfectly clear that the covenant does mean it," and declares that a legal instrument is not to be construed by the equivocal acts of the parties thereto. This subject is commented upon in 2 Phil. Ev. 802, note 526, where the interpretation of the various rulings is made entirely consistent with our view. The term "usage" is generally employed, but that is but a series of acts by those interested, clearly indicating, so far, their understanding; and the learned annotators, after reviewing the decisions, say: "The above decisions, which relate principally to private instruments, will be found perfectly consistent with the admissibility of usage to explain ambiguous instruments," and then quote 3 Dane's Ab. 363, § 16, where he says that it is "now, on the whole, a well-settled rule of evidence that the acts of the parties, or usage, may be proved to explain doubtful words or clauses in a deed or other sealed instruments."

So far as time and opportunity for clearly ascertaining the construction given by the parties are concerned, it is seldom that a case has arisen where they have been more fully afforded than in the case at bar. For more than twenty years the plaintiff and defendant were constantly acting under their contract, and the conduct of both parties pointed alone to one understanding. The city from time to time made orders for additional lamps, with the guarantee of the six per cent. named in the contract. The Gas Company proceeded to their erection, and regularly presented their bills for gas furnished, and during the whole period no distinction whatever was made between the price for the 263, now claimed to have been alone fixed by the contract, and the price for the additional lamps. They are not even separately stated in the bills, and in two of the earlier ones they are all spoken of as "per contract," which refers as well to price as to authority to furnish. There is only one question, then, open to consideration, and that is whether there is such ambiguity in the agreement itself as to admit of construction. The intention of the parties must be first sought in the instrument in all its parts,

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The St. Louis Gaslight Co. v. The City of St. Louis.

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in its scope and purpose, and in the circumstances in which the parties were placed; and before deciding whether we may consider the practical interpretation of the parties, we must see whether this intention is clear and unmistakable.

The contract opens with an order for 263 lamps, and further on provides for the payment of \$25 a year per lamp for those "herein ordered." So far all seems plain, and if the price can only refer to the 263 lamps—if, from other provisions and the object of the agreement, no doubt can be thrown upon the intention of the parties in this regard—then the contract is not open for construction. But let us see.

Plaintiff's charter gives it a monopoly—the "exclusive privilege of erecting gaslights," etc., "in the city of St. Louis and its suburbs." This was its declared object; the terms upon which such lights were to be supplied were left to the contract, and the city could only be bound by its contract. Now what more natural than, in making arrangements for lighting the whole city, that some understanding should be had in relation to the price, not only in the small district to be lighted at once, but elsewhere, as the lamps should be extended? The first contract insured the life of the company, and, unless it were bound by some terms, placed the city at its mercy. Would the city authorities be likely to place it in that position?

On further inspecting the contract, I find, in addition to the 263 lamps expressly ordered, an agreement to furnish such additional lamps as may be ordered, of which six months' notice is to be given, with a guarantee of six per cent. profit upon the cost. I find also that, in a certain contingency, a reduction is to be provided for "in the price agreed upon in the gas furnished to the city," etc., "in virtue of this agreement." This reference to the price agreed upon for the gas of the city means the whole city, and the provision for the guarantee of six per cent. for any extension of lamps would imply that some price for the whole was fixed in the agreement—the one directly and the other by natural inference. The one shows directly that the price was fixed in the agreement, and in regard to the other, it may be fairly said, if the company was still at liberty to charge a *quantum meruit*,

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The St. Louis Gaslight Co. v. The City of St. Louis.

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why should the guarantee of profit be required? If the company were at liberty in regard to price, it could secure its own profit.

But when I look at the writing to find the price, I find it to be fixed only for the lamps "herein ordered," and I am then forced to the conclusion either that the price of the 263 was alone provided for, or that the phrase was carelessly used, and did not express the true meaning of the parties, but that they intended instead, "herein contracted for," or "herein provided for." Plausibility is given to the latter construction, not only from provisions and considerations already referred to, but from the want of precision in other parts of the instrument, as in the second paragraph the words "hereby contracted for" evidently refer to all the lamps ordered and to be ordered, while in the third paragraph the term "herein contracted for" has reference alone to those ordered.

Are not these considerations (and others might be given) enough to create a doubt whether a price was intended to be provided for all the lamps, or only the 263? One party now contends for one view, the other party for the opposite. If, for more than twenty years before this contest, the parties agreed as to what that intention was, I think they should be bound by that agreement as the best attainable evidence of their original intention.

Counsel submit an elaborate argument to show that the contract could not have extended beyond the city limits as then existing; that, so far as it operated upon the extensions, it was *ultra vires* and void. Had the contract by its terms provided for lighting the streets beyond such limits, it would have been so far inoperative as an exercise of territorial jurisdiction beyond its range. But it contained no such provision. The additional orders for lamps were all to be within the city, and the city is a unit, though with changing boundaries. There might be a question as to the extension of the exclusive rights of the plaintiff, for grants of monopolies are to be strictly construed; but there is no doubt that a city ordinance or a city contract, designed for the city at large, operates throughout its boundaries whatever their change.

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The St. Louis Gaslight Co. v. The City of St. Louis.

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As to the meaning of the contract itself in regard to its extension, the plaintiff should be estopped from seeking to limit it. The record shows that after the great expansion of the city, another gas company was organized to supply the extended limits; that it sought to enforce its right to furnish such supply, but was resisted by the plaintiff, who, in answer to a petition by the new company to restrain its interference, claimed that its monopoly extended throughout the whole city; that its original charter covered the suburbs, now the extended limits; that, in the exercise of its powers under its contract (the same contract now in controversy), it had carried its works through the new parts of the town, so as to be able to comply with this contract, had made large investments under it by works in the new limits, etc., etc. The record also shows that the orders of the city for new lamps in the extended limits were made in the same form, and complied with, and the gas paid for in the same manner as in the old city. So that it appears without dispute that for a long series of years the plaintiff has claimed, exercised, and been supported in the exclusive right of occupying, under and by virtue of this contract, the new as well as the old city limits; and now, having the ground in possession, and being able to defy competition, this company claims that it does not hold its place and power by virtue of the contract; that outside of the old city limits it is not bound by its terms, and may there charge its own price for its gas.

I do not know that I fully understand the charge of the Circuit Court in referring to the ambiguity of the terms "city of St. Louis" and "herein ordered," as arising from extrinsic facts. If by extrinsic facts were meant such facts as may be shown to explain a latent ambiguity, the term can hardly apply. "The city of St. Louis" has a meaning of which the court will take notice, and its boundaries are fixed by law, and the term "herein provided" must refer to the provisions of the contract; and its ambiguity does not arise from any extrinsic fact, but from other parts of the contract, and from its history and object. But from the whole instruction it clearly appears that the court meant to submit the inquiry to the jury whether the contract had received a construction from the acts of the parties, whether they, by

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 Tuppery v. Hertung.
 

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their conduct, had clearly shown their intention and meaning, as embodied in its language; and this was a question of fact, and not of law.

The other judges concurring, the judgment will be affirmed.

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FRANCIS TUPPERY, Defendant in Error, v. CHARLES HERTUNG,  
Plaintiff in Error.

1. *Practice, civil—Exceptions, bill of—Only matters patent on record noticed.*—Where no exceptions are preserved, only such matters as are patent on the face of the record proper will be noticed.
2. *Partition—Petition—Allegations, what sufficient.*—In a partition suit, allegations of seizin in the ancestor and descent to the heirs are, *prima facie*, sufficient to vest both title and possession in the latter.
3. *Partition—Under act of 1865, attorneys could not stipulate for judgment in what cases.*—Where the answer in a suit for partition stated, among other things, that administration had not been closed on the estate sought to be partitioned, and that there were not sufficient personal assets to pay the debts of the deceased, the attorneys of record, under the partition act of 1865 (Gen. Stat. 1865, ch. 152, § 51), had no power to stipulate that judgment of partition should be rendered, even though it was further agreed that the proceeds arising from the sale under the partition should be subject to the debts of the deceased.

*Error to Second District Court.*

*Brown & Davis*, for plaintiff in error.

To legally maintain partition, the petition must show affirmatively: 1. That the estate is held in joint tenancy, tenancy in common or coparcenery, and whether the estate is of fee, for life, for years, tenancy by curtesy, or in dower. (Gen. Stat. 1865, p. 611, §§ 1, 3; Gould's Pl., ch. 4, §§ 4-13; Stephens' Pl. 304; Myers v. Field, 37 Mo. 441; Frazer v. Roberts, 32 Mo. 457.) 2. That plaintiff is in actual possession of the realty with the defendant; the right of possession merely is not sufficient. (Lambert v. Blumenthal, 26 Mo. 473; McCabe v. Hunter, 7 Mo. 355; *id.* 446; Frazer v. Roberts, *supra*.) 3. That the intestate had title to the realty; mere seizin is not sufficient. (Frazer v. Roberts, *supra*; Gen. Stat. 1865, p. 611, § 3.) 4. "That the estate from which the realty has descended has



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Tupperry v. Hertung.

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been finally settled, and all claims against it fully discharged." This is a statutory condition precedent to partition. (Gen. Stat. 1865, p. 611, § 51; 8 Cow. 369; Fithian v. Monks, 43 Mo. 520; Frazer v. Roberts, *supra*.)

G. H. Green, for defendant in error.

WAGNER, Judge, delivered the opinion of the court.

Error to a judgment of the Second District Court, where a judgment of the Court of Common Pleas of Cape Girardeau county was affirmed in a proceeding in partition. No exceptions are preserved, and therefore only such matters as are patent on the face of the record proper will be noticed.

We do not think that there is anything in the point that the petition is defective in not containing sufficient allegations to warrant the decree. It alleges seizin in the ancestor, and descent to the heirs, and that was *prima facie* sufficient to vest both title and possession. No objection was taken by answer, and the averment was substantially good.

The answer filed in the cause stated that administration had not been closed on the estate sought to be partitioned, and that a year had not elapsed since the taking out of letters of administration on the estate; that there were not sufficient personal assets to pay the debts of the deceased, and that the real estate would be required for that purpose.

With this answer standing on the record uncontradicted, the attorneys of record entered into an agreement by which they stipulated that judgment for partition should be rendered, and the proceeds arising from the sale should be subject to the debts of the deceased. In accordance with this arrangement a judgment for partition was rendered and the land ordered to be sold.

This proceeding was commenced and prosecuted to its final termination under the provisions of the partition act of 1865. The fifty-first section of that act declares that in all cases where proceedings are commenced under this chapter, and the lands, tenements or hereditaments, or any portion thereof, sought to be divided as hereinbefore directed, shall have descended to any of

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Barney v. White.

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the parties in interest, no judgment of partition or assignment of dower shall be rendered, and no order of distribution shall be made, until the court shall be first satisfied that the estate from which the same has descended has been finally settled and all claims against it fully discharged. (Gen. Stat. 1865, ch. 152, § 51.) This section has been since that time modified and altered. (See 2 Wagn. Stat. 973, § 51.) I have no doubt about its being within the province of attorneys in the cause, in the conduct thereof, to agree upon the terms, and what kind of a judgment shall be entered.

But the judgment must be in conformity with the law, not in violation of it. The statute here is express and peremptory that no judgment of partition shall be rendered until the court shall be satisfied that the estate has been finally settled and all claims against it fully discharged. The action in the court below was to supersede the statute and proceed in direct conflict with its imperative prohibitions. It was not competent for the attorneys to do this.

The judgment must therefore be reversed and the proceedings dismissed. The other judges concur.

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HIRAM BARNEY, Respondent, v. DAVID WHITE, Appellant

1. *Judgments of sister States conclusive evidence of what.*—Judgments rendered in other States are not treated as foreign; and though they are not so far domestic that they can be enforced without a new judgment, they are conclusive of everything except jurisdiction over the parties or the subject-matter; and where the service on defendant was good according to the laws of the State where the judgment was obtained, the court of that State would obtain jurisdiction of defendant's person, and the judgment would be at least *prima facie* evidence of the indebtedness sued on.

*Appeal from St. Louis Circuit Court.*

Rankin & Hayden, for appellant.

The law of Iowa can have no extra-territorial operation, no power to compel this court to recognize as a judgment what would be no judgment. (Thurber v. Blackstone, 1 N. H. 242; Wood v. Wilkinson, 17 Conn. 500; Thompson v. Emmett, 4

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Barney v. White.

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McLean, 96; Holt v. Alloway, 2 Blackf. 108; Warren Manuf. Co. v. Aetna Ins. Co., 2 Paine, 513; Webster v. Reid, 11 How. 437; Randolph v. Keiler, 21 Mo. 568.) The position of the appellant is that the record must show actual notice by personal service within the State where the judgment is rendered. (Harris v. Hardeman, 14 How. 340; Latimer v. The Pacific R.R., 43 Mo. 109.)

*J. T. Tatum*, for respondent.

I. With regard to a foreign judgment, it is settled that the judgment in an action brought directly upon it is *prima facie* evidence to sustain the action. (2 Phillips' Ev. 181; Henderson v. Henderson, 6 C. B. 288; Ferguson v. Mahon, 11 Ad. & El. 179; Ricardo v. Garcias, 12 Clark & Fin. 368; Bank of Australia v. Nias, 4 Eng. L. & Eq. 252; Lazier v. Westcott, 26 N. Y. 146; Cummins v. Banks, 2 Barb. 601; Sto. on Conflict of Laws, § 607.) But a judgment of a sister State is conclusive, provided the court had jurisdiction over the subject and over the person. (Hall v. Williams, 6 Pick. 232; D'Arcy v. Ketchum, 11 How. 165.)

II. The record is *prima facie* evidence of jurisdiction, and must be held conclusive until clearly and explicitly disproved. The *onus* of impeaching the jurisdiction is on the defendant. (Taylor v. Bryden, 8 Johns. 173; Shumway v. Stillman, 4 Cow. 292; Warren v. McCarthy, 25 Ill. 95; Buffon v. Stimpson, 5 Allen, 591; Mills v. Stewart, 12 Ala. 90; Christmas v. Russell, 5 Wall. 305; Martin v. Barron, 37 Mo. 301, 306; Dunbar v. Hallowell, 34 Ill. 168.) This court has expressly recognized the doctrine that the action and the judgment of the court finding the service sufficient, is *prima facie* evidence of its sufficiency. (Blackburn v. Jackson, 26 Mo. 308; Willson v. Jackson, 10 Mo. 331; see generally Rosco' v. Hackett, 3 Bosw. 579; Black v. Black, 4 Brad. 174; Lazier v. Westcott, 26 N. Y. 146; Bissell v. Wheelock, 11 Cush. 277; Fullerton v. Horton, 11 Verm. 425; Sturgis v. Fay, 16 Ind. 430; Bimeler v. Dawson, 5 Ill. 536; Rosenthal's Adm'r v. Renick, 44 Ill. 207; Biesenthal v. Williams, 1 Duvall, 332; Buford v. Kilpatrick, 8 Eng. 33.)

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Barney v. White.

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BLISS, Judge, delivered the opinion of the court.

This is an action upon a judgment by default rendered in the State of Iowa, and the defendant claims that the judgment was invalid for the reason that he was not served with process and did not appear. The following was the sheriff's return of service: "This notice came into my hands April 26, 1862, and I served same on David White by delivering a true copy of said notice to Jenny Gilman, at his usual place of residence in Keokuk, Lee county, Iowa, she being a member of his family, over the age of fourteen years, said David White not being found." This manner of notice is admitted to be in accordance with the laws of Iowa.

The defendant denied that at the time of the commencement of the suit or thereafter, he was a resident of Iowa, or was in the State, or had actual notice, but offered no evidence to sustain his answer. He objected at the trial to the admission of the record of the judgment as any evidence of indebtedness.

Had the defendant sustained his answer by evidence, it would have become necessary to consider some questions that have often been raised, and upon which the authorities have not been altogether harmonious. But as it is, I can see no question that will admit of serious discussion. A foreign judgment is *prima facie* evidence of indebtedness at the time, and becomes conclusive unless impeached. Judgments rendered in other States are not treated as foreign, and though they are not so far domestic that they can be enforced without a new judgment, they are conclusive of everything except jurisdiction over the parties or the subject-matter. The service upon defendant was good according to the laws of Iowa, and gave the court jurisdiction over his person, and the least that can be said of the judgment under it is that it furnishes *prima facie* evidence of indebtedness.

The judgment of the Circuit Court is affirmed. The other judges concur.

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Coffey v. The National Bank of the State of Missouri.

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**BENJAMIN F. COFFEY, Respondent, v. THE NATIONAL BANK OF THE STATE OF MISSOURI, Appellant.**

1. *Banks and banking institutions, liability in—Trove against national banks for money deposited prior to their reorganization.*—The Bank of the State of Missouri, by reorganizing under the act of Congress of 1863 (U. S. Stat. at Large, ch. 106, p. 112, § 44) as a national bank, lost none of its assets and escaped none of its liabilities. The change was a transit, and not a new creation; and in trover against the bank, after its reorganization, for certain packages of coin specially deposited with it prior to the change, *held*, that the proper rule of damages would be the value of the coin at date of its conversion, together with lawful interest thereon. *Held*, further, that the refusal of the bank, on request, to return the deposit, was evidence of conversion, and, if unexplained, was conclusive of the fact.

*Appeal from St. Louis Circuit Court.***C. F. Burnes, for appellant.**

I. The defendant, being only a gratuitous bailee without hire or reward, was bound only for ordinary care, and liable only in case of gross negligence. (Sto. on Bail., § 63; Jones on Bail. 48; 2 Kent. 567; Foster v. Essex Bank, 17 Mass. 479; McLean v. Rutherford, 8 Mo. 109.)

II. There was no evidence tending to show that defendant ever did any business under the name of the Bank of the State of Missouri. On the contrary, the evidence shows that the defendant had no corporate existence prior to October, 1866.

III. The defendant was bound to exercise proper care in the selection of its officers and employees, and having employed skillful, prudent, and honest officers and agents, is not liable for loss to a gratuitous bailee without proof of conversion.

IV. The measure of damage could not in any case exceed the amount of money deposited by plaintiff, and interest thereon from a time when return thereof was demanded. Therefore it was manifest error in the Circuit Court to instruct the jury to add 38½ per centum to the amount of gold and 28½ per centum to the amount of silver so deposited. It was competent for the Circuit Court, on the verdict of the jury in behalf of the plaintiff,



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Coffey v. The National Bank of the State of Missouri.

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to order that the judgment thereon should be satisfied only in gold or silver.

V. It was error for the Circuit Court to recognize by its instruction any difference in value between the several kinds of lawful money of the United States; but if a contract called for money of a particular kind, or if a particular kind of money was deposited by plaintiff as special deposit, and defendant is chargeable with it as for a conversion, then the court might enforce satisfaction of the judgment in the kind of money called for by the contract.

*Crews & Laurie*, for respondent.

I. No question has been more completely set at rest than that, in an action of trover, a demand and refusal constitute a *prima facie* case of conversion, which becomes conclusive unless rebutted or explained. (*O'Donoghue v. Corby*, 22 Mo. 393; *Huxley v. Hartzell*, 44 Mo. 370; *Coggs v. Bernard*, 1 Smith's Lead. Cas. 417-21, and cases cited; *Magee v. Scott*, 9 Cush. 148; *Lockwood v. Bull & Eager*, 1 Cow. 322.)

II. The rule is well settled that in actions of trover the measure of damages is the value of the property at the time of the conversion, with interest from that date.

III. The provisions of the legal tender act apply only to debtor and creditor, and the relation of debtor and creditor does not subsist between a special depositor and his bailee. The rule is clear that in cases of special deposit, the title to the money or property so deposited does not pass out of the depositor and vest in the bailee, but continues in the depositor, and he is entitled to the possession of the identical money or property so deposited. (*Wood v. Edgar*, 13 Mo. 451; *Thompson v. Riggs*, 5 Wall. 663; *Jacques v. Edgell*, 40 Mo. 76; 27 Ind. 426.)

IV. The National Bank was simply a reorganization of the State Bank under the act of our Legislature, pursuant to act of Congress; all the stock, assets, and capital of the State Bank passed to the National Bank. So far as legal liability was concerned, it was only a change of name. (*Morse on Banks*, 489; *Grocers' National Bank v. Clark*, 48 Barb. 26.)

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Coffey v. The National Bank of the State of Missouri.

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CURRIER, Judge, delivered the opinion of the court.

The plaintiff sues in trover to recover the value of a special deposit originally made with the Bank of the State of Missouri, March 20, 1865, consisting of \$90.95 in silver and \$1,415 in gold coin. It is alleged that the defendants, July 1, 1867, converted the deposit to their own use, the bank at that time having taken its present name and become organized as a national institution. The answer denies both the fact of the deposit and of the alleged conversion, but admits that certain packages were deposited, and avers that they were duly returned to the plaintiff.

At the trial, the plaintiff read in evidence the act of March 5, 1866 (Sess. Acts 1865-6, p. 15), authorizing the Bank of the State of Missouri to reorganize as a national institution under the act of Congress, and also gave other evidence tending to prove the allegations of the petition and to show that the reorganization contemplated by the act of March 5 was in fact effected prior to the alleged conversion of the plaintiff's deposit, and that said deposit had passed into the possession of the defendant. No available objection was made to the proofs. At the instance of the plaintiff, the court, among other instructions, directed the jury, in case they found for the plaintiff, to assess as damages for the alleged conversion the currency value of the coin, the rate of premium having been agreed on between the parties. The defendants controvert the correctness of this instruction, and deny their legal accountability for the acts or negligence of the Bank of the State of Missouri.

1. By the act of Congress making provision for a national currency (U. S. Stat. at Large, ch. 106, p. 112, § 44) it is provided "that any bank incorporated by special law, or any banking institution organized under a general law of any State, may, by authority of that act, become a national association under its provisions, by name prescribed in its organization certificate; and in such cases the articles of association and the organization certificate required by the act may be executed by a majority of the directors of the bank or banking institution; and that said certificate shall declare that the owners of two-thirds of the

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Coffey v. The National Bank of the State of Missouri.

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capital stock have authorized the directors to make such certificate, and to change and convert the said bank or banking institution into a national association under said act; and a majority of the directors, after executing said articles of association and organization certificate, shall have power to execute all other papers, and do whatever may be required to make its organization perfect and complete as a national association. The shares of any such bank may continue to be for the same amount each as they were before said conversion; and the directors aforesaid may be the directors of the association until others are elected or appointed in accordance with the provisions of said act." Under the legislation of the State and of Congress, the Bank of the State of Missouri became a national banking association, as the evidence tended to show and as the jury found the fact to be. It thus passed from one jurisdiction to another; but its identity was not thereby necessarily destroyed. It remained substantially the same institution under another name. The transition did not disturb the relation of either the stockholders or officers of the corporation, nor did it enlarge or diminish the assets of the institution. These all remained the same under the national as they were under the State organization. The bank neither lost any of its assets nor escaped any of its liabilities by the change. The change was a transition, and not a new creation. (See *Grocers' National Bank v. Clark*, 48 Barb. 26; *Thorp v. Wegefarth*, 56 Penn. St. 82.)

2. The court laid down a correct rule of damages. It is but plain justice that the plaintiff should have back his deposit in specie, or else its value in currency. The rule of damages in trover is the value of the converted property at the date of the conversion, with the interest thereon. The plaintiff was entitled to the marketable value of his coin at that time. This subject is discussed in the *Bank of the State, etc., v. Burton*, 27 Ind. 426. There the court say: "While we have two kinds of money made by statute exact equivalents for the purposes of ordinary tender and payment, and yet of notoriously irregular values in commerce, results will now and then follow the application of the law which are not consonant with justice. Must it be so in this case?

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Coffey v. The National Bank of the State of Missouri.

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It has been often held that where the amount of debt has been ascertained, the courts can not, in view of the act of Congress, recognize any difference between the gold dollar and the legal tender note of the denomination of one dollar as a means of tender or payment. But it does not follow that when the bailee of specific gold coin, to be re-delivered in specie, sells the same for a premium, and fails to re-deliver it on demand, he shall not answer in damages to the amount which he has realized by the conversion. That he should have the right to make a profit for himself by his own wrongful act, is a proposition having no foundation in justice, and is not sanctioned by any principle of law."

The case referred to was decided in accordance with the foregoing views, the court holding that when a bailee converted to his own use coin intrusted to his care, the recovery should be for the currency value of the coin. (See also *Frothingham v. Morse*, 45 N. H. 545.) In the case at bar, the verdict of the jury established the fact that the plaintiff left with the defendant, or with the Bank of the State of Missouri—which, for the purposes of this suit, is the same thing—the amount of coin stated in his petition as a special deposit, to be returned in specie on demand; that demand of it was duly made, and that the defendant neglected and refused to return the deposit upon such request. Such refusal was evidence of conversion, and, unexplained, was conclusive of the fact. There was no explanation, and the defendant is liable for the conversion, and, as already stated, the court gave the correct rule of damages applicable to the facts of the case.

3. The question as to the measure of diligence does not arise in the case. The bank does not put its defense upon the ground that the coin committed to its care was lost while in its custody, without fault or negligence on its part or on the part of its officers. That is not its line of defense. It denies that it ever had possession of the coin, and insists that if it ever did have it, the same was returned to the plaintiff. So the pleadings stand, and the case appears to have been tried upon that theory. The question, therefore, of diligence on the part of the bailee does not

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Hume v. Wainscott.

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come up. It would seem somewhat absurd for a party to insist that he had kept with reasonable care, as a gratuitous bailee, and faithfully returned, what never came to his possession.

Some other objections of a technical character are made in the brief of the defendant's counsel, but it is not perceived that the court committed any error that would warrant a disturbance of the judgment. It will therefore be affirmed. The other judges concur.

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JAMES R. HUME, Appellant, v. IRVIN WAINSCOTT, Respondent.

1. *Land and land titles—Tax sales—Land assessed in wrong name, sale invalid.*—In ejectment for land bought at a tax sale, where it appeared that the assessment was made and judgment rendered in the name of one not the owner, *held*, that the advertisement was no notice to defendant; that there was no valid judgment, and that plaintiff acquired no title by the sale. (Abbott v. Lindenbower, 43 Mo. 162, affirmed.)\*

*Appeal from Fourth District Court.*

O. Guilar, for respondent.

J. R. Shields, for respondent.

BLISS, Judge, delivered the opinion of the court.

The plaintiff, in 1866, purchased certain lands of defendant upon tax sale for delinquencies of 1863, and received the proper deed. He brings ejectment, and the defendant shows that in and before the year 1863, he was the owner of and was in possession of the lands, and that the assessment was made and judgment rendered in the name of one William Sexton, the original owner.

The question involved in this record was fully considered in Abbott v. Lindenbower, 43 Mo. 162, where it was held that such assessment was invalid and did not sustain the judgment and sale.

The plaintiff insists that this construction of the law works a hardship on purchasers, and enables dishonest citizens to evade the payment of their taxes. This can not be so when the assessor does his duty, and under careless or incompetent officers the public interests always suffer and the dishonest always thrive.

\* Decided at July term; inserted here inadvertently.



## Peers v. Kirkham.

The law in force when this assessment was made provided that "in all cases" land should be "assessed to the person appearing to be the owner at the time of the assessment," and authorized the assessor to require, under a penalty, a list of all one's property, to make out a list upon his own view, to enter upon land and make any examination and search which may be necessary, and examine the property, or any person upon oath touching the same. He was thus clothed with ample powers, and, had he obeyed the law, could easily have ascertained that defendant Wainscott, and not Sexton, appeared to be the owner at the time. The land was not assessed to defendant, the advertisement was no notice to him, there was no valid judgment, and the plaintiff acquired no title by the sale.

The other judges concurring, the judgment will be affirmed.

## VAL. J. PEERS, Appellant, v. ROBERT KIRKHAM, Respondent.

1. *Bills and notes—Judgment against indorser—Costs of not recoverable by indorser from maker—Judgment, evidence of—Money paid.*—The indorser of a promissory note can not recover against the maker the costs of the judgment recovered against him as indorser. The judgment against the indorser is not evidence against the maker; and where the indorser has satisfied a judgment upon the note against himself, his claim against the maker is upon the note itself, and not for money paid. (Fenn v. Dugdale, 31 Mo. 580, affirmed.)

*Appeal from St. Louis Circuit Court.*

*Davis & Davis*, for appellant, cited *New York State Bank v. Fletcher*, 5 Wend. 85; *Booth v. Smith*, 3 Wend. 63; *Wiseman v. Lyman*, 7 Mass. 286, 290; *Cole v. Sacket*, 1 Hill, 516; *Waydell v. Luer*, 5 Hill, 448; *Smith's Merc. Law*, 533.

*Krum & Decker*, for respondent, relied on *Fenn v. Dugdale*, 31 Mo. 581; *Smith v. Ross*, 7 Mo. 463.

WAGNER, Judge, delivered the opinion of the court.

The record shows that in the year 1848, Peers & Kirkham, a firm of which the plaintiff was a member, paid, laid out, and

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Harvey et al. v. Sulleps et al.

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expended the sum of \$276.45 in goods and moneys for the use of defendant, for which they received his promissory note, payable at ninety days; that Peers & Kirkham afterward assigned and delivered said note to Edward J. Gay & Co., in payment of a debt due by them to Gay & Co.; that defendant afterward, and at the maturity of the note, failed to pay the same; that Gay & Co. then sued Peers & Kirkham, and recovered judgment against them in the St. Louis Court of Common Pleas, which judgment, with interest and costs, amounted to \$303.36; that plaintiff, Peers, alone paid and satisfied said judgment out of his own money; that the defendant never paid the note nor the judgment recovered by Gay & Co. against Peers & Kirkham. Upon these facts the plaintiff asked judgment for the amount so paid by him in satisfaction of the said judgment, interest, and costs. The Circuit Court, at special term, rendered judgment accordingly, but this judgment was reversed at general term.

It is impossible to distinguish this case from that of *Fenn v. Dugdale*, 31 Mo. 580. It was there held that the indorser of a promissory note could not recover against the maker the costs of the judgment recovered against him as indorser; that the judgment against the indorser was not evidence against the maker of the note; and that, where the indorser had satisfied a judgment upon the note against himself, his claim upon the maker was upon the note itself, and not for money paid. The case of *Fenn v. Dugdale* being regarded as decisive authority here, the judgment must be affirmed. The other judges concur.

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DAVID D. HARVEY *et al.*, Appellants, *v.* ISAAC SULLENS *et al.*,  
Respondents.

1. *Will, when prepared by devisee, looked on with suspicion—Presumption against its validity.*—Where one standing in relation of confidence to a testator who is old and *in extremis*, prepares a will in his own favor, the law regards the transaction with great suspicion. The clearest evidence is required that there was no fraud, influence, or mistake. The presumption is against the propriety of the transaction; and the *onus* of establishing the devise to have been voluntary and well understood rests on the party claim-

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Harvey et al. v. Sullens et al.

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ing; and this in addition to the evidence to be derived from the execution of the will conveying or devising the property.

2. *Wills—Persons incapable of transacting ordinary business, incapable of making a will.*—*Semble*, that as a general rule, where deceased was, at the time of executing his will, old and infirm in body and feeble and childish in mind, and so incapable of transacting his ordinary business, he has not sufficient capacity to make a will.
3. *Wills—Undue influence.*—In suit to test the validity of a will, where the evidence shows that the will would not have been executed by deceased but for the influence exercised over his mind and will, the jury should find that the will was procured by undue influence, and was not his last will.

*Appeal from St. Louis Circuit Court.*

*Geo. P. Strong*, for appellants.

A gift to an agent will be upheld if intelligently and freely made. (*Nesbit v. Lockman*, 34 N. Y. 167; same principle in *Harris v. Tremeneere*, 15 Ves. Ch. 38, 39.) The most that can be claimed from the authorities is that when a confidential relation exists between the testator and beneficiary under the will, the onus of proving that the will was intelligently and freely made, rests upon the party claiming under it. (*Kinne v. Kinne*, 9 Conn. 102; *St. Leger's Appeal*, 34 Conn. 434, 442.)

*T. G. C. & G. W. Davis*, for respondents.

I. If an attorney, trustee, or agent of a testator, writes his will while the relation subsists and takes a benefit under the will, the law presumes undue influence, and the courts require a clear preponderance of evidence that "everything connected with the making and execution of the instrument was free from impropriety and unfairness," and also "that juries must be satisfied that the relation had no undue or improper influence over the mind of the testator, and did not induce him to make a different disposition of his estate, or any portion of it, from what he otherwise would have done." (*St. Leger's Appeal*, 34 Conn. 450; *Garvin's Adm'r v. Williams*, 44 Mo. 465; *Waterson v. Waterson*, 1 Head, 1; *Wilson v. Moran*, 3 Bradf. Sur. 172.)

II. The fact that one makes a will *in extremis* in favor of those around him, and makes no provision, or an inadequate one,

for his children, is entitled to great consideration as evidence of fraud. (Goble v. Grant, 2 Green's Ch. 629; 1 Redf. on Wills, 510, 515, 521.) The testatrix's will is clearly inofficious, which alone is sufficient to excite apprehension of undue influence at the very least. (1 Redf. on Wills, 137-8.)

III. Where a devisee writes or procures another to write a will, it must be proved that the intention to give originated with the testator, and not with the devisee or drawer. (3 White & Tud. Lead. Cas. 141; 34 Conn. 450; 3 Bradf. Sur. 507; *id.* 185; Maury v. Sibley, 2 Bradf. Sur. 134-51; Converse v. Converse, 21 Verm. 168; Waterson v. Waterson, 1 Head, 1.)

WAGNER, Judge, delivered the opinion of the court

This case is brought here by appeal to review a judgment of reversal rendered in the general term of the St. Louis Circuit Court. The proceeding was commenced under the statute to set aside the will of Elizabeth Sip, which was admitted to probate in St. Louis county on the first day of December, 1864. The will bears date the 24th day of November, 1864, and devises to Sullens all the real estate of which the testatrix died seized, and bequeaths to five grandchildren and one great-grandchild small bequests — \$100 to each of her granddaughters, and \$100 and her clothes to her sister, Mrs. Maria Longworth, for "her kindness to the testatrix in her last sickness," and also a bed to a girl of the name of Pritchett, who was a servant in the house of the testatrix, and \$50 each to her grandsons, and \$50 to her great-grandson. Sullens, the devisee, wrote the will, is made executor, and gets about five-sixths of the whole estate.

Upon the trial in the court below, certain issues were framed and submitted to the jury, who found in favor of the will, and judgment was rendered accordingly, which was reversed in general term. The material question raised is the action of the court on the trial in refusing certain instructions asked by the plaintiffs.

The petition proceeds upon two grounds: first, that the testatrix was not of sound mind when the will was executed; and, second, that the defendant, Sullens, procured it by fraud and undue influence.



Without undertaking to go into any minute detail of the evidence, the substantial facts appear to be these: The testatrix, Mrs. Sip, was an old lady about 73 years of age; kept house and resided on her farm. The witnesses all agree that, though uneducated, she possessed a strong mind and had good business capacity, but in the latter part of her life she became quite childish and irritable. Her immediate relations, grandchildren and great-grandchildren, and three sisters, were all poor, and there does not seem to have existed any particular enmity or unfriendliness between them. Sullens, the principal devisee and executor, was an entire stranger in blood to the testatrix, was her near neighbor, was on terms of the utmost intimacy with her, belonged to the same church, and occasionally took her to meeting in his wagon. That he had acquired her complete confidence is conclusively shown. The testatrix had made two wills several years previous to the one now in controversy, and it seems that Sullens wrote them both; but what disposition she made of her property does not appear.

In her last illness, when in fact she was *in extremis*, all hopes of recovery having vanished, Sullens, who was always attentive, is found at her bedside, conversing with her in so low a tone of voice that her sister, Mrs. Longworth, although but a few feet distant, could not understand anything that was said. A memorandum was then taken, and in the evening Sullens came back with the will written by himself. On his way to the house of the testatrix, he met a man by the name of Green, almost a stranger, and requested him to return and witness the will. Dr. Williams, a brother-in-law of Sullens, was already in the house. Sullens then asked all the household and those in attendance, including Mrs. Longworth, the sister, to retire from the room, which they did, leaving him, the testatrix and Dr. Williams alone in the room. It then appears the will was read to her, after which Green was beckoned by Sullens to come in, when, with the assistance of Williams, she made her mark and acknowledged in the presence of those three that it was her last will, and expired in three or four days thereafter. At the time of the execution of the will, Sullens enjoined secrecy on the witnesses, and requested



them to say nothing about it during the life of the testatrix, if she died in her then present illness.

An analogous question to the one here presented was discussed with some fullness by this court at the last October term, in the case of *Garvin's Administrator v. Williams et al.*, 44 Mo. 465. It was there attempted to be shown with what distrust and suspicion the law looks upon all transactions where persons occupying a special or confidential relation seek to obtain an advantage inconsistent with their position. The general principles therein laid down need not be here reiterated, and we shall therefore confine this examination to a more exact review of the question raised and directly involved.

It is within the experience and observation of every one that old persons *in extremis* may be easily imposed upon by those in whom they confide. / Where, therefore, a party standing in this relation to such a testator prepares a will in his own favor, it can not but excite suspicion, and create in the minds of those who are called upon to pronounce on it a desire to have other evidence than proof of the execution of the instrument and the testable capacity of the deceased. Where a person is so sick, worn out, and enfeebled that he is a mere passive instrument in the hands of those who produce the will, or where he allows others to control and dispose of his estate in order to escape their offensive dictation and annoyances, it is evident such a will ought not to be permitted to stand; and if the person in whose favor or through whose influence the will is made, either for his own benefit or that of others, is conscious, as an ordinary person will be presumed to be conscious, that an unjust result was being obtained in having the will made as it was, and such result is attained through the agency of other minds than that of the testator, the will can not be maintained. (See *Gilbreath v. Gilbreath*, 4 Jones' Eq., 142; *Dean v. Negley*, 41 Penn. St. 312; *Floyd v. Floyd*, 3 Strob. 44; *Woodward v. Jones*, *id.* 552; *Means v. Means*, 5 Strob. 167.)

In *Barry v. Butlin*, 1 Curteis' Ecc. 637, Baron Parke, in delivering the opinion of the court, says: "The rules of law, according to which cases of this nature are to be decided, are

two: the first, that the *onus probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator. The second is that if a party writes or prepares a will, under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favor of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased."

In the case of *Sears v. Shafer*, 2 Seld. 268, the rule is thus stated: "A court of equity interposes its benign jurisdiction to set aside instruments executed between persons standing in the relation of parent and child, guardian and ward, physician and patient, solicitor and client, and in various other relations, in which one party is so situated as to exercise a controlling influence over the will and conduct and interests of another. In some cases undue influence will be inferred from the nature of the transaction alone; in others, from the nature of the transaction and the exercise of occasional or habitual influence."

It is certain that, in a case like the present one, the law regards the transaction with great suspicion. The clearest evidence is required that there was no fraud, influence, or mistake. The presumption is against the propriety of the transaction, and the *onus* of establishing the devise to have been voluntary and well understood rests upon the party claiming; and this in addition to the evidence to be derived from the execution of the will conveying or devising the property. From the very nature of the transaction, undue influence is presumed, and the absence of it must be shown by the party sustaining the devise; but the presumption is one of fact, and not of law, and may be rebutted by proper evidence.

11. The gross inequality exhibited by the testatrix in almost totally disinheriting those who had strong claims upon her bounty, and willing nearly all her property to an entire stranger in blood, is suggestive of unfairness, and requires satisfactory explanation.

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Harvey et al. v. Sullens et al.

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That she had the power to so dispose of her estate is undoubted, but its unreasonableness requires the clearest evidence that it was the deliberate offspring of her own unbiased mind, and flowed from a free and uninfluenced volition.

We will now briefly advert to the instructions which the court refused to give, and which refusal is assigned as error. The first and second, in the shape in which they were drawn, were, I think, well enough refused. The third asked the court to charge the jury that if they believed from the evidence in the cause that Isaac Sullens was the principal devisee named in the paper writing propounded as the last will and testament of Elizabeth Sip, deceased, and that said Sullens wrote the same himself, and procured a kinsman of his to witness the same, and caused the relatives and friends of the deceased to leave the room while he and his said kinsman read, or pretended to read, the same to the said Elizabeth Sip, such facts and conduct on the part of the said Sullens were evidence of fraud and undue influence on the part of Sullens in procuring the said Elizabeth to make the paper writing as her will.

Perhaps the instruction is rather too broadly stated in declaring absolutely that the acts enumerated are evidence of fraud and undue influence, though I think they were proper to be considered by the jury, and from which they might deduce or infer undue influence or fraud, and with this modification it ought to be given. The fourth request or charge asked was to the effect that if the jury believed from the evidence that Elizabeth Sip, deceased, was, at the time of putting her mark to the paper writing propounded by the defendant, Sullens, old and infirm in body and feeble and childish in mind, and so incapable of transacting her ordinary business, then she had not sufficient capacity to make a will.

In all cases, as an abstract proposition of law, this instruction would not be quite accurate. Great contrariety exists in the adjudication as to what is necessary or sufficient to constitute testable capacity. In England, in all cases where the person is regarded as a fit subject of a commission of lunacy, he is *prima facie* incompetent to execute a will; and Lord Eldon, in Sher-

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Harvey et al. v. Sullens et al.

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wood v. Sanderson, 19 Ves. 280, thus states the rule: "It must appear that the object of the commission is of unsound mind and incapable of managing his affairs." And in cases in this country it was said that if one be able to transact the ordinary affairs of life, he may, of course, execute a valid will. (Tomkins v. Tomkins, 1 Bailey, 92; Coleman v. Robertson, 17 Ala. 84.) But this criterion can not be regarded as a test in every particular case. However, I am inclined to the opinion that, under the circumstances here presented, the instruction was correct, and should have been given. The fifth instruction told the jury that if they believed, from the evidence in the cause, that the defendant, Sullens, was the principal devisee in the paper propounded by him as the last will and testament of Elizabeth Sip; that he wrote it himself, requested the subscribing witnesses to subscribe their names to it as witnesses, and further requested one of said subscribing witnesses, who was the only witness that knew anything about the contents of said paper, to keep it a secret until after the death of Mrs. Sip, then they were warranted in considering such evidence as tending to prove that Sullens procured the said Sip, by fraud and undue influence, to sign her mark to the said paper.

The instruction is unexceptionable, and its merits have been sufficiently discussed in a prior part of this opinion. The sixth instruction asked told the jury that undue influence was alone sufficient, if proved to their satisfaction, to impeach and set aside a will under it; and that, as a matter of law, if they were satisfied from the evidence, when taken as a whole, that the paper propounded by Sullens would not have been made by the said Sip and signed with her mark as her last will and testament but for the influence exercised over her mind and will by Sullens, then they should find that it was procured from the said Sip by undue influence, and that the same was not her last will. The seventh instruction told the jury that if they found from the evidence in the cause that the testatrix, Sip, signed the paper writing propounded as her last will and testament, and that she was coerced to do so by force, fraud, or deceit practiced upon her by Sullens and another or others in his interest and acting at his request,

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The State ex rel. Bornefeld v. Rombauer.

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then the paper writing was not the last will and testament of the deceased Sip.

We see no valid objection to either of the foregoing instructions, and think they should have been given.

For the error in refusing the instructions, we are of the opinion that the judgment of the general term was correct, and it will therefore be affirmed and the cause remanded for a new trial in conformity with this opinion. The other judges concur.

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THE STATE *ex rel.* BORNEFELD, Appellant, v. ROBERT J. ROMBAUER, Respondent.

1. *Corporations — Transfer of stock — Action at law, and not mandamus, the proper remedy.*—Where a corporation improperly refuses to transfer stock on its books, the party injured has an ample remedy by an action at law for the market value of the stocks, and *mandamus* to compel such transfer will not lie.

*Appeal from St. Louis Circuit Court.*

*Kincaly*, for appellant.

*Finkelnburg & Rassieur*, and *Krum & Decker*, for respondent.

Relator has an action at law—a complete and adequate remedy—and where a substantial remedy by action at law exists, *mandamus* does not lie. (State *ex rel.* Bohannon v. Howard County, 39 Mo. 376; *ex parte* Freeman's Ins. Co., 6 Hill, 243; Shipley v. Merchants' Bank, 10 Johns. 485; King v. Bank of England, Doug. 525; Ang. & Ames on Corp., 8th ed., §§ 709, 710.)

WAGNER, Judge, delivered the opinion of the court.

This was an application for a *mandamus* made to the St. Louis Circuit Court by the relator against the respondent as president of the German Publishing Company. The writ recites that the German Publishing Company was organized as a corpo-



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The State ex rel. Bornefeld v. Rombauer.

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ration under the statute laws of this State, and that the respondent was president of the corporation and the custodian of its books; that on the 19th day of May, 1869, one August Lenz was a stockholder in said company and owned more than two shares of the capital stock, and was registered as such owner on the books of the company; that afterward, on the day last mentioned, the said Lenz being then and there the owner of said shares, did sell and assign unto the relator all the right, title, and interest of him, the said Lenz, in and to two of said shares of the capital stock of said company, and did execute and deliver to the relator his bill of sale of said two shares; that afterward, on the 21st day of May, 1869, relator notified the corporation, and the respondent as president, that Lenz had assigned and sold said shares to him, and exhibited to the respondent the bill of sale, and then requested and demanded in writing that the shares should be transferred to him on the books of the company, and that the request was without any good cause refused; and that afterward, at a reasonable time, he demanded access to the books of the company to inspect and examine the same, which demand was also refused. He then prayed for a writ of *mandamus* to compel the company to make the transfer.

An alternative writ was granted, and upon a return thereof the respondent moved to quash the same, because the matters and things therein set forth were not sufficient to entitle the relator to the relief asked for, or to authorize the issuance of the writ. This motion was sustained, and the relator appealed.

It is very clear that the relator misconceived his remedy, and that he may obtain adequate and ample redress without resorting to a proceeding by *mandamus*. If he has good title to the stock he can recover the market value in an ordinary action. There can be no necessity for his possessing the identical shares in question. A controversy might spring up in regard to the ownership, and that would require an adjudication at law. Courts will not venture on determining such matters by proceedings on *mandamus*.

It is the uniform and current ruling of the courts that where a corporation improperly refuses to transfer stock on its books,

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The City of St. Louis v. Bissell.

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the party injured has an ample remedy by action, and therefore a *mandamus* to compel such transfer will not lie. Mr. Angell, in speaking on this subject, says: "Upon this ground a *mandamus* has been refused to compel a bank to permit a transfer of stock on the books of the company, since complete satisfaction, equivalent to a specific relief, may be obtained in an action on the case." (Ang. & Ames on Corp., § 710; King v. Bank of England, Doug. 526; Boyce v. Russell, 2 Cow. 444; Shipley v. Mechanics' Bank, 10 Johns. 484; Asylum, etc., v. Phoenix Bank, 4 Conn. 172; *ex parte* Fireman's Ins. Co., 6 Hill, 243; Wilkinson v. Providence Bank, 3 R. I. 22.)

Judgment affirmed. The other judges concur.

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THE CITY OF ST. LOUIS, Respondent, v. LEWIS BISSELL,  
Appellant.

1. *Damages—Covenant against encumbrances—Evidence—Assessment of damages.*—A corporation having purchased certain lands encumbered with leasehold, had them condemned, and the damages to the lessees were assessed in court. Action afterward being brought against the vendor on his covenant against encumbrances, it appeared that, although not technically a party to the record in the proceedings for assessment of damages, he had been duly notified, and had ample opportunity to appear and defend his interests. *Held*, that the judgment assessing the damages was properly admissible in evidence.
2. *Damages—Eminent domain—Covenant against encumbrances, measure of damages in action on.*—For a breach of the covenant of seizin, the measure of damages is the consideration given and received. But the damages for the breach of a covenant against encumbrances depends upon the value of the encumbrance, without reference to the value of the land or the purchase money. The covenantee is entitled to recover what he has paid to extinguish the encumbrance, if he has had a reasonable and fair price. (Henderson v. Henderson, 13 Mo. 161, affirmed.)

*Appeal from St. Louis Circuit Court.*

Cline, Jamison & Day, for appellant.

The ultimate extent of the vendor's responsibility, under all or any of the usual covenants in his deed, is the purchase money, with interest. If the eviction be only of a part of the land

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The City of St. Louis v. Bissell.

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purchased, the damages to be recovered under the covenant of seizin are a ratable part of the original price, and they are to bear the same ratio to the whole consideration that the value of the land to which the title has failed bears to the value of the whole tract. (4 Kent's Com. 477; Dickson v. Desire's Adm'r, 23 Mo. 151.)

*Samuel Knox*, for respondent.

The measure of damages in an action on a covenant against encumbrances is the amount necessary to remove the encumbrances. (Thayer v. Clement, 22 Pick. 490; Willets v. Burgess, 34 Ill. 494; Green v. Tillman, 20 N. Y. 191; Giles v. Dugan, 1 Duer, 331; Stowell v. Bennett, 34 Maine, 422; Porter v. Bradley, 7 R. I. 538; Pratt v. Boleman, 6 Cush. 549; Kelley v. Lowe, 18 Maine, 244; Leffingwell v. Alcott, 10 Pick. 204; 20 Pick. 474; Sedgw. on Dam. 178.)

WAGNER, Judge, delivered the opinion of the court.

Bissell, by a general warranty deed, containing a covenant against encumbrances, dated July 18, 1867, conveyed to the city of St. Louis 95<sup>85</sup>/<sub>100</sub> acres of land for the consideration of \$95,850, which was duly paid to him by said city. The deed contained this clause: "Excepting and reserving to the temporary lessees of Lewis Bissell, located on the bank of the Mississippi river, the right to remove and carry away the buildings by them respectively erected thereon."

An act of the Legislature, entitled "an act to enable the city of St. Louis to procure a supply of wholesome water," approved March 13, 1867, authorized the city of St. Louis, through its board of water commissioners, to acquire lands, etc., necessary for constructing reservoirs for the waterworks. Section 18 of the said act empowers the commissioners, if they can not agree with the property-holders as to the amount of the compensation to be paid, to institute legal proceedings for the condemnation of the property desired.

The commissioners, in the prosecution of their work, told Bissell that it was necessary for them to have the possession of the

land covered by the leases. He afterward told them that he could make no arrangements with the lessees, and that they could make better terms than he could. He authorized them to go ahead and condemn the leases, but said nothing as to the mode of condemnation. It seems that the lessees refused to make any satisfactory arrangements, or to remove the buildings, and under the law three disinterested freeholders were appointed by the Circuit Court to assess the damages. These damages being objected to by the lessees, a trial was had in the Circuit Court before a jury, which resulted in verdicts assessing the total amount of \$3,838.50 to the respective lessees, together with costs. An attorney's fee was also allowed, but as that was afterward remitted, it will be unnecessary to further consider it here. These damages were paid by the city, and this suit is now brought against Bissell to recover them, as for a breach of his covenant against encumbrance. The Circuit Court gave judgment for the city.

It is admitted that the leases were all confined to an area of land covering about  $1\frac{264}{1000}$  acres, and that the value of that portion of the property covered by the leases, either in reference to its market value or to its value as determined by the consideration in the deed from Bissell to the city, was the sum of \$1,264.

Upon the trial the defendant's counsel objected to the reading of the judgment assessing damages in evidence, on the ground that Bissell was not a party to the proceedings, and was therefore not bound by them. The objections were overruled and the judgments permitted to be read. Although Bissell was not technically a party to the record, I perceive no good or valid objection to the ruling of the court. He was duly notified, and had full and ample opportunity to appear and defend his interests. When told by the commissioners that it was necessary that the leases should be extinguished to enable them to make the property available and prosecute the work, after an ineffectual attempt to agree upon terms with the lessees, he reported that he could make no satisfactory arrangements, and authorized them to proceed to the condemnation. They acted in pursuance of his authority and under his express direction, and we think that he ought to be estopped from now raising the objection. But it is contended



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The City of St. Louis v. Bissell.

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here that the damages are excessive, and that, as the value of the particular piece of property on which the leases existed was only about \$1,264, that amount, with interest thereon, would constitute the sum for which Bissell would be liable on his covenant.

That there is great diversity in regard to the rule which should govern such cases in different States, is undisputed. But with us it must be considered as definitely established. For a breach of the covenant of seizin, the measure of damages is the consideration given and received. This question was most elaborately considered in this court in the case of *Dickson v. Desire's Adm'r*, 23 Mo. 151. But in an action for breach of covenant against encumbrances, the amount of damages depends upon what the covenantee has been compelled to pay to extinguish the encumbrances. (*Henderson v. Henderson*, 13 Mo. 151.)

In this last case, which was an action for breach of covenant on account of encumbrances, this court, speaking through Mr. Justice Napton, says: "In the present action the amount of the consideration and the fact of its payment or non-payment were matters entirely immaterial to the issue. In an action upon a covenant of seizin, the damages are regulated by the purchase money and interest. Hence some courts have permitted the defendant in this action to go behind the deed, and prove the actual consideration to have been less than that expressed in the deed. But the damages for the breach of a covenant against encumbrances depend upon the value of the encumbrance, without reference to the value of the land or the purchase money. The covenantee is entitled to recover what he has paid to extinguish the encumbrance, if he has had a reasonable and fair price." And this view of the law is sustained by many authorities. (*Rawle on Cov.* 138, note 1, where the cases are collected.)

As to the reasonableness and fairness of the price paid in the extinguishment or removal of the encumbrances, I think there can be no doubt. The matter was fairly passed upon by a jury and determined with a full view of the evidence, and with the finding we are content.

Judgment affirmed. The other judges concur.



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Busby v. Holthaus et al.

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JOHN BUSBY, Appellant, v. ANTON HOLTHAUS *et al.*, Respondents.

1. *Damages—Servitudes—Excavations—Pressure of buildings, etc.*—In a suit for damages caused by the bursting of a sewer and certain privies in plaintiff's premises, and the sliding in of an embankment about them into a cellar recently excavated by defendant, *held*, that plaintiff had a right to a support from the adjoining soil for his land in its natural state, but, in order to recover in such action, it should appear that the slide was not caused by the pressure of his buildings or by his sewer, and that the slide caused the bursting of the sewer.

*Appeal from St. Louis Circuit Court.*

H. B. O'Reilly, for appellant.

Hitchcock & Lubke, for respondents.

BLISS, Judge, delivered the opinion of the court.

Defendants excavated a cellar up to the back line of plaintiff's lot. Less than four feet from this line was a row of brick privies for the accommodation of the tenement houses belonging to the plaintiff, and under the privies and parallel to the edge of the cellar ran a brick sewer communicating with the large sewer in the street. A few days after the cellar was dug, the bank caved in, the sewer burst, and the water, etc., ran into the cellar. The case was tried on appeal from the judgment of a justice of the peace, and was submitted to the court sitting as a jury, the plaintiff claiming that the sliding in of the bank and bursting of the sewer was caused by the excavation and removing of the support to which the plaintiff's lot was entitled; and the defendants, on the other hand, claiming that it was the result of the weight of the privies and the obstructions in the sewer which dammed up the water and caused the sewer to burst.

The plaintiff had a right to a support from the adjoining soil for his land in its natural state, and if the slide was not caused by the pressure of his buildings or by his sewer, and if the slide caused the bursting of the sewer, he is entitled to recover. The opinion of Judge Leonard in *Charless v. Rankin*, 22 Mo. 566,

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Busby v. Holthaus et al.

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is a learned and able discussion of the law involved in this case, rendering comment upon the general law quite unnecessary. And I will only consider the one declaration which was asked by the plaintiff and refused, which is as follows: "If the court, sitting as a jury, believe from the evidence that defendants excavated a cellar some six feet deep, and twenty-five feet or more along and up to the place of division between the respective lots of plaintiff and defendants; that the plaintiff's land was in its natural state, save that a sewer (with privies connected) had been constructed by plaintiff  $3\frac{1}{2}$  feet distant from and parallel to the place of division aforesaid, and at a depth of an average of five feet below the surface; that defendants had taken no precaution to prevent a caving of plaintiff's land into their cellar, and that the clay and earth, some twenty feet in length and three to four in width along said plane of division, did cave into said cellar, and that immediately thereafter plaintiff's sewer also caved in, then defendants are responsible for the damage occasioned thereby, although plaintiff may have known that the excavation aforesaid was being made." The facts recited alone may have been sufficient to warrant the court in finding that the slide in the land was caused solely by the digging, without any pressure from the erections or other works of the plaintiff, yet the declaration is not full and is somewhat ambiguous, and the court doubtless so considered it. There is very great significance in the phrase "save that a sewer, with privies connected, had been constructed," etc., and a suggestion that the land could not be in its natural state. The fault in the instruction consists in the assumption, as matter of law, that the caving in was not caused by the plaintiff's buildings or sewer—that if they had not been there it would have happened all the same. If, at the end of the hypothetical statement and before the deduction, were added the further hypothesis that the falling in of the earth was not caused by the buildings or sewer, and that it caused the breaks in the sewer, then the declaration would have been correct and should have been given. As it is, it presents a partial and uncertain view of the case. The testimony would certainly warrant, if not require, that the loss be charged to defendants, but it was a ques-

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Gibson v. The Pacific Railroad Co.

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tion of fact as to what caused it, and no errors of law are made to appear.

The judgment of the Circuit Court must therefore be affirmed. The other judges concur.

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GEORGE W. GIBSON, Respondent, v. THE PACIFIC RAILROAD COMPANY, Appellant.

1. *Corporations—Railroad—Negligence—Machinery, failure to adopt proper—Employees responsible for consequences.*—Where injuries to servants or workmen happen through the negligence, misfeasance, or misconduct of a fellow-servant, no action therefor can be maintained against the master unless the fellow-servant is not possessed of ordinary skill and capacity in the business intrusted to him, and unless his employment is attributable to the want of ordinary care on the part of the master. But where such injuries are owing to improper or defective machinery or appliances used in the prosecution of the work—the condition of which, by reasonable and ordinary care and prudence, the master might know—and not to the lack of care and prudence in the employees, the rule is otherwise, and the master would be liable. The legal implication is that the employer will adopt suitable instruments and means with which to carry on his business. If he fails to do so, he is guilty of a breach of duty under his contract, for the consequences of which, in justice and sound reason, he ought to be responsible.

*Appeal from St. Louis Circuit Court.*

*Whittelsey*, for appellant.

- I. The master is not liable to his servant for the acts of a fellow-servant, and the difference in grade of employment does not alter the rule. (*Wilson v. Merry*, 1 L. R. H. L., Sc., 326; *Tarrant v. Webb*, 37 Eng. L. & Eq. 281; *Priestly v. Fowler*, 3 M. & W. 1; *Wigmore v. Jay*, 5 Exch. 354; *Hutchinson v. York*, etc., R.R., 5 Exch. 343; *Wiggett v. Fox et al.*, 36 Eng. L. & Eq. 486; 11 Exch. 832; *Scott v. Mayor*, etc., of Manchester, 38 Eng. L. & Eq. 477; *Hard. Adm'r. v. Verm. Car. R.R.*, 3 Verm. 473; *Wallis v. S. E. R.R. Co.*, 3 Hurl. & Co. 102; *Faulkner v. Erie R.R. Co.*, 49 Barb. 324; *Ryan v. Fowler*, 24 N. Y. 410; *Keegan v. West*, 8 N. Y. 175; *Marshall v. Stewart*, 33 Eng. L. & Eq. 1; *Patterson v. Wallace*, 28 Eng. L. &

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Gibson v. The Pacific Railroad Co.

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Eq. 48; Wright v. N. Y. Cent. R.R., 25 N. Y. 562; 17 N. Y. 153; Russell v. Hudson River R.R., 17 N. Y. 134.) The rule applicable to injuries caused by negligence of fellow-servants is declared in Rohback v. Pacific R.R., 43 Mo. 187; McDermott v. Pacific R.R., 30 Mo. 115; Little Miami R.R. v. Stevens, 20 Ohio, 415; Faulkner v. Erie R.R., 49 Barb. 324.

II. The first instruction asked by and given for the plaintiff laid down an erroneous rule of law, as applicable to the facts of the case, for the guidance of the jury. There was no evidence whatever that the defendant—that is, its board of directors or its superintendent—knew of this defect in the repair of the spring; and to charge that “the defendant might have known, by the exercise of reasonable care and diligence,” is to require a personal supervision, and forbid the employment of servants and agents without accepting a personal responsibility for their acts—a duty the law does not impose. (See opinions of Lord Chancellor and of Lords Cranworth and Chelmsford in Wilson v. Merry *et al.*, *supra*; Bartonshill Coal Co. v. Reid, 3 McQueen, 282, cited in Wilson v. Merry.)

III. The defendant was not compelled to warrant the perfection of its machinery and cars; it could only use care and diligence to furnish complete machinery. The burden of proof was upon plaintiff to show that the company had knowledge of the defect. He alleged that fact in his petition, and the only evidence in proof of the allegation was that there was a defect. (Mobile & Ohio R.R. Co. v. Thomas, 8 Ann. Law Reg., N. S., 154; Wilson v. Merry *et al.*, *supra*; Tarrant v. Webb, 37 Eng. L. & Eq. 281.) The qualification “that defendant might have known” wholly destroys the effect of the instructions given for the defendant, and the instructions put the case to the jury on an erroneous hypothesis as to the facts.

*Terry & Terry*, and *Stewart & Wieting*, for respondent.

I. A master is liable to his servants for his negligence. (Snow v. H. R.R., 8 Allen, 445; Keegan v. Western R.R., 4 Seld. 175; Noyes v. Smith, 28 Verm. 62; Ryan v. Fowler, 24 N. Y.



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Gibson v. The Pacific Railroad Co.

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413; Wright v. N. Y. Cent. R.R., 25 N. Y. 565; Marshall v. Stewart, 33 Eng. L. & Eq. 7.)

II. The degree of negligence is to be determined by the situation and surroundings of the business of the master, and the occupation of the servant. If the danger to which the master exposed his servant is great, the vigilance of the master is proportionately increased. The degree of care required is higher when life and limb are endangered. (Cayzer v. Taylor, 10 Gray, 274; Loomis v. Terry, 17 Wend. 496; Castle v. Duryea, 32 Barb. 480; Morgan v. Cox, 22 Mo. 373.) The position in which the defendant was placed was dangerous in the extreme, and the care and vigilance of the defendant were correspondingly increased. As to what constitutes a dangerous occupation, see 36 Mo. 23, 25, 354.

III. The master is bound to place in the hands of his servants, as the law declares, good and sound machinery, and use all reasonable precaution for the safety of his employees. (Ryan v. Fowler, 24 N. Y. 420; Buzzell v. Laconia Manuf. Co., 48 Maine, 113; Hallower v. Henley, 6 Cal. 209; Noyes v. Smith, 28 Verm. 59; Cayzer v. Taylor, *supra*; Frazer v. Penn. R.R., 38 Penn. St. 104; McDermott v. P. R.R., 30 Mo. 115.)

IV. The principle, that the master is not responsible for injuries inflicted on one servant by another, is applicable only when the injury happens without any fault or misconduct, such as carelessness and neglect in the master, either in the act which caused the injury or the person who caused it. (Perry v. Marsh, 25 Ala. 659; Patterson v. Wallace, 28 Eng. L. & Eq. 48; Marshall v. Stewart, 33 Eng. L. & Eq. 1; Mad River & L. E. R.R. v. Barber, 5 Ohio St. 541; Fifield v. Northern R.R., 42 N. H. 225.)

V. The effect of the fourth instruction would have been, if allowed, to relieve the master of all liabilities unless he had knowledge of the condition of the machinery used by him. This, as a proposition of law, may be good in cases where the master had immediate control of his affairs; but as a proposition of any force in cases where the charge and oversight of the business are delegated to other parties, as must be done in corporations, it has no weight. The board of directors had delegated their



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Gibson v. The Pacific Railroad Co.

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power of representation to their superintendent, and his acts must be held to be the acts of the board. One to whom the employer commits the charge of his business, with power to choose his own assistants, and to control and discharge them as freely as the principal himself could, is not a fellow-servant with those who are employed under him, and the principal is answerable to all the under-servants for the negligence of such managing assistants, either in his personal conduct within the scope of his employment, or in his selection of other servants.

VI. The plaintiff's instructions were properly allowed, and for the reason that they contain what we believe the law in this case. It was the want of care which constituted the negligence. The placing defective machinery upon its road by the defendant exhibited such a want of care as to render it liable. We concede that a knowledge of the defective condition of the machinery is one of the more certain elements which unite to constitute a case of neglect; but to this proposition there is the alternative proposition of equal weight, viz: that where proof is given that the master is ignorant of the defective condition of the machinery he uses, through his own negligence and want of care, he is equally culpable. He must either know or ought to know the condition of the implements and accommodations he furnishes his servants. (Wright v. N. Y. Cent. R.R. Co., 25 N. Y. 566; Keegan v. W. R.R., 4 Seld. 175; Hayden v. Smithville Manuf. Co., 29 Conn. 548; Marshall v. Stewart, 33 Eng. L. & Eq. 1; Farwell v. B. & W. R.R. Co., 4 Metc. 49; Hord v. Vermont & C. R.R. Co., 32 Verm. 473; Buzzeli v. Laconia Manuf. Co., 48 Maine, 113; Fifield v. Northern R.R., 42 N. H. 225.)

WAGNER, Judge, delivered the opinion of the court.

+ This was an action for damages brought by the respondent, an employee of the appellant, a railroad company, against the company, on account of injuries received through the negligence and carelessness of the company in using upon its road defective and dangerous machinery. The respondent was a brakeman on the road, and, as such, it was his duty to assist in coupling cars to form a train, and the case shows that he was a careful and prudent

man. While acting under orders of the conductor, the train was backing on a switch to take on an additional car, and, while engaged in inserting the link in the drawhead, the cars came so closely together that in withdrawing his hand it was caught between the deadwoods or buffers, and smashed so that he lost three fingers. There was evidence going to show that the officers of the road, and the master mechanic who had charge of the road and repair shops, were skillful and competent men, but it most clearly appears that the coupling apparatus, as used on the cars which the respondent was coupling, was dangerous and defective, and that the company was engaged in altering the cars in which a like defect existed, to make them conform to a better standard and consist with greater safety. X

Judgment was given for the respondent in the court below, and the case is appealed here. The objections are to the action of the Circuit Court in giving and refusing instructions. For the respondent the court gave two instructions. The first was as follows: "If the jury find from the evidence in this case that the apparatus used for coupling the cars by which the plaintiff was injured, or either of them, from its make and construction, was unsafe, and the defendant knew thereof, or might have known thereof by the exercise of reasonable care and diligence, they are instructed that the defendant is liable to plaintiff for any injuries he has received in consequence of such defect in the make and construction of such apparatus, after it was known or ought to have been known by defendant, if they further believe that plaintiff was exercising ordinary care and prudence at the time he received the injury, and did not know of the defect in said apparatus, and that the same was not due to the carelessness of any fellow-servant of the plaintiff." The second instruction related to the measure of damages, and no point is made upon it in this court.

The appellant asked five instructions, three of which were given and two refused. The following were given:

"1. Although the car by which the plaintiff was injured was defective by having too short a spring, yet if the directors and superintendent of said railroad were ignorant of the defect of

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Gibson v. The Pacific Railroad Co.

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said car, and used due care and diligence in procuring its cars, and selecting careful and competent servants to construct and procure said cars, then the defendant is not liable.

"2. If the Pacific Railroad selected competent and skillful subordinates and servants to supervise, inspect, regulate, and control its freight cars while running on its road, and used due care in constructing and procuring said cars, then the plaintiff, being a servant employed on said road, can not recover in this action.

"3. The plaintiff, as a servant in the employment of defendant, assumed all the risks belonging to the employment he undertook; if, therefore, the plaintiff was injured by and through the negligence of another fellow-servant or person employed on said road, then the plaintiff can not recover."

The following are the instructions of the appellant refused:

"4. If the Pacific Railroad, the defendant in this cause, selected competent and skillful subordinates and servants to supervise, inspect, regulate, and control its freight cars while running on the road, and if any defect in the car by which the injury happened was unknown to the board of directors representing the company, then the plaintiff can not recover.

"5. The plaintiff, as a servant in the employ of the defendant, assumed all the risks belonging to the employment he undertook, if, therefore, the plaintiff was injured by and through the negligence of another fellow-servant in the employ of defendant, by means of the negligence of such fellow-servant in sending out or using a car with a spring in the drawhead defective by being too short, and if such defect was unknown to the board of directors of defendant, then the plaintiff can not recover in this action."

+ The principles of law which must govern in this case are not to be confounded with the rule which has so often been announced and adjudged, that a servant of a corporation who has been injured by the negligence, misfeasance, and misconduct of his fellow-servant can maintain no action against the master for such injury unless the servant by whose negligence or misconduct the injury was occasioned is not possessed of ordinary skill and

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Gibson v. The Pacific Railroad Co.

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capacity in the business intrusted to him, and the employment of such incompetent servant is attributable to the want of ordinary care on the part of the master. (McDermott v. Pacific R.R. Co., 30 Mo. 115; Rohback v. Pacific R.R. Co., 43 Mo. 187.)

A workman or servant, on entering upon any employment, is supposed to know and to assume the risk naturally incident thereto; if he is to work in conjunction with others, he must know that the carelessness or negligence of one of his fellow-servants may be productive of injury to himself; and besides this, what is more material, as affecting his right to look to his employer for damages for such injuries, he knows or ought to know that no amount of care or diligence by his master or employer can by any possibility prevent the want of due care and caution in his fellow-servants, although they may have been reasonably fit for the service in which they are engaged.

It is neither unjust nor unreasonable that consequences which the servant or workman must have foreseen on entering into an employment, and which due care on the part of the employer or master could in no way prevent, should not be visited on the latter. But it is otherwise where injuries to servants or workmen happen by reason of improper and defective machinery and appliances used in the prosecution of a work. The use of those they could not foresee. The legal implication is that the employer will adopt suitable instruments and means with which to carry on his business. These he can provide and maintain by the use of suitable care and foresight, and if he fails to do so he is guilty of a breach of duty under his contract, for the consequences of which, in justice and sound reason, he ought to be responsible. (Snow v. Housatonic R.R. Co., 8 Allen, 441, per Bigelow, C. J.; Cayzer v. Taylor, 10 Gray, 274; Seaver v. Boston & Maine R.R., 14 Gray, 466.) Any other rule would be productive of the greatest injustice and wrong. The servant has no control over the matter. He acts in subordination. He relies wholly on the judgment of the masters, that suitable machinery and the needed requirements are supplied. He has not the means nor the opportunity of knowing whether those furnished may be safe. His attention is exclusively due to the peculiar duties inci-



dent to his branch of the employment. He assumes the risk, more or less hazardous, of the service in which he is engaged; but he has a right to presume that all proper attention shall be given to his safety, and that he shall not be carelessly and needlessly exposed to risks not necessarily resulting from his occupation, and which might be prevented by ordinary care and precaution on the part of his employer.

In England, where the principle has been so firmly established, ever since the decision in *Priestly v. Fowler*, that a servant can not recover of his employer for the negligence or carelessness of a fellow-servant, the courts have universally held that the master will be liable for ordinary neglect in the use of defective machinery or apparatus from whence injury results. Upon this ground the English, the Scotch, and the American law all concur. In *Patterson v. Wallace*, 1 McQueen, 748, Lord Cranworth says: "I believe by the law of England, just as by the law of Scotland, in the actual state of the case with which we have to deal here, a master employing servants upon any work, particularly a dangerous work, is bound to take care that he does not induce them to work under the notion that they are working with good and sufficient tackle, whilst he is employing improper tackle, and, being guilty of negligence, his negligence occasions loss to them." The same view of the law was taken by Lord Brougham in that case.

The case of *Marshall v. Stewart*, 33 Eng. L. & Eq. 1, was an appeal heard in the House of Lords, from a judgment of the Court of Sessions in Scotland, in an action by the representatives of a miner killed by injuries arising from the shaft of the pit being in an unsafe state, owing to the negligence of the defendant, his employer. The law of Scotland was, throughout the case, treated as the same with the law of England. The servant, in that case, was killed while leaving his master's employment without proper cause. "A master," says Lord Cranworth, "by the law of England and by the law of Scotland, is liable for accidents occasioned by his neglect to those whom he employs." I quite adopt the argument of the Solicitor-General, "that he is duly responsible while the servant is engaged in his employment;



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Gibson v. The Pacific Railroad Co.

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but then we must take a great latitude in the construction of what is being engaged in his employment," and he further adds that the liability of the master continues "whatever he does in the course of his employment, according to the fair interpretation of the words *eundo, morando redeundo*; for that the master is responsible, and it does not in my opinion make the slightest difference that the workman had, according to the finding of the jury, no lawful excuse for going out, no lawful excuse for leaving their work." "The master," remarks Lord Brougham in the same case, "who let them down is bound to bring them up, even if they come on their own business and not on his; he is answerable for the state of his tackle by which the lamentable accident was occasioned."

In *Byden v. Stewart*, 2 McQueen, 30, the Lord Chancellor, among other things, said: "The law of both countries (England and Scotland) makes a master liable for accidents occasioned by his neglect toward his servants."

In the case of *Dixon v. Rankin*, 14 Court of Sess. Cas. 420, the Lord Justice Clerk held that "the master of men in dangerous occupations is bound to provide for their safety. This obligation extends to furnishing good and sufficient apparatus, and keeping the same in good condition; and the more rude and cheap the machinery, and the more liable on that account to cause injury, the greater obligation to make up for its defects by the attention necessary to prevent such an injury."

In *Roberts v. Smith et al.*, 2 Hurl. & Nor. 213, the injury arose from a rotten and defective scaffold, over which the plaintiff, a bricklayer, was compelled to pass in the course of his employment; and in consequence of its rottenness, it broke, and the plaintiff fell to the ground. The case decides the liability of the defendant if the injury arose from his negligence, he knowing the condition of the scaffold, and the servant being ignorant thereof.

In *Williams v. Clough*, 3 Hurl. & Nor. 259, it was alleged in the declaration that the defendant was possessed of a granary and ladder leading up to it; that the ladder was wholly unfit and unsafe for use; that the plaintiff was a servant for hire of

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Gibson v. The Pacific Railroad Co.

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the defendant; that the defendant, knowing the premises, wrongfully and deceitfully ordered the plaintiff to carry corn up the ladder into his granary; that the plaintiff, believing the ladder to be fit for use, and not knowing to the contrary, did carry corn up the ladder to the granary, and, by reason of the ladder being unsafe, the plaintiff fell from it and was injured. It was held, on demurrer, that the declaration was sufficient. The American authorities are equally decisive.

In *Mad River & Erie R.R. Co. v. Barber*, 5 Ohio St. 541, the court says: "If the defects which caused the injury were actually unknown to the company or the conductor, and were not discoverable by due and ordinary care and inspection, and yet were such as resulted from a neglect of reasonable and ordinary care and diligence on the part of the company, either in procuring or continuing to use cars and machinery beyond the time when they could be safely used, the company will be liable." In the same court, in *McGartrick v. Wason*, 4 Ohio St. 566, the general rule is declared to be that an employer who provides overseers and controls the operation of machinery must see that it is suitable; and if a defect, unknown to a workman, injures him, which ordinary care could have prevented, the employer is liable for the injury.

So, in *Wright v. N. Y. Cent. R.R. Co.*, 25 N. Y. 565, the court says: "The master is liable to his servant for any injury happening to him from the misconduct or personal negligence of the master, and this negligence may consist in the employment of unfit and incompetent servants and agents, or in furnishing for the work to be done, or for the use of the servants, machinery or other implements and facilities improper and unsafe for the purposes to which they are to be applied."

In *Keegan v. Western R.R. Co.*, 4. Seld. 175, a railroad company which continued a defective and dangerous locomotive was held liable to its servant engaged in running such machine, for an injury sustained by him (without negligence on his part) in consequence of such defects.

In *Fifield v. Northern R.R.*, 42 N. H. 225, the plaintiff, a brakeman in the employ of the defendant corporation, being

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Gibson v. The Pacific Railroad Co.

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injured without fault on his part, by their negligence in permitting the road to be blocked up with snow and ice, and their car to be out of repair, was held entitled to maintain an action to recover compensation for the damages by him so sustained.

Under the instruction given for the respondent in this case, the jury must have found that he was exercising ordinary care and prudence at the time he received the injury; that he did not know of the defect in the apparatus used in the coupling of the cars, and that the injury was not due to the carelessness of any fellow-servant. The three instructions given for the appellant were as favorable as could have been asked. The argument is now pressed that the last two instructions, numbered four and five respectively, which were refused, should have been given, because there was no evidence that notice of the defect was brought directly home to the knowledge of the directors of the company, and that, for the same reason, the respondent's instruction, which declared that the company was liable if they knew or might have known, by the exercise of reasonable care and diligence, that the apparatus was unsafe and dangerous, should have been refused.

The difference lies in what amount of care and diligence the master is bound to exercise in supervising and examining the machinery that he furnishes for the use of his servants. The testimony in the case tends strongly to show that the condition of the drawhead was not due to use or negligent repairing, but to improper and defective construction. The company fully recognized the defect, and were altering and improving the cars thus constructed.

But the instruction given for the respondent is well supported by authority and is founded in reason. If, by reasonable and ordinary care and prudence, the master may know of a defect in the machinery he operates, it is his duty to be advised, and not needlessly expose his servants or employees to hazard, peril, or mutilation. The servant has no means of ascertaining the facts, the master has, and therefore he should exercise that care which devolves on a prudent man in like circumstances.

In *Hayden v. Smithfield Manuf. Co.*, 29 Conn. 548, it was

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Schroeder v. The Stock and Mutual Ins. Co.

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held that a servant might maintain an action against his master, for an injury caused by defective machinery, when the employer knew or ought to have known of the defect, and the servant did not know it and had not equal means of knowledge.

In *Noyes v. Smith*, 28 Verm. 59, the declaration averred that the plaintiff was hired by the defendants to have the charge of and conduct and run an engine, and that, by virtue of said employment, it became the duty of the defendants to furnish an engine that was well constructed and safe, etc., but that they, carelessly and wrongfully furnished an insufficient engine; that the insufficiency was unknown to the plaintiff, and, "but for want of all proper care and diligence, would have been known to the defendants;" and that, while the plaintiff was in the careful and prudent use of said engine, it exploded on account of said insufficiency, and injured the plaintiff, etc. Held, on demurrer, that the declaration disclosed a sufficient cause of action.

To the same effect is *Ryan v. Fowler*, 24 N. Y. 410, where it was decided that the master was responsible to his servant for injuries received by the latter from defects in the building in which the services were rendered, which the master knew or ought to have known.

Upon a full view of the record, I have been unable to discover any error. I think that the law was properly declared, and that a fair trial was had. I therefore advise an affirmance.

Judgment affirmed. The other judges concur.

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JOHN C. SCHROEDER, Defendant in Error, v. THE STOCK AND  
MUTUAL INSURANCE COMPANY, Plaintiff in Error.

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1. *Insurance, marine — Agreement — False representation.*—The insurance of a barge was to commence, by the terms of the policy, "wherever she was in safety on the 26th day of March, 1868, \* \* \* with permission to navigate the Mississippi from the city of St. Louis to Helena," etc. The policies were issued while the barge was lying opposite Alton and ready to be loaded. It was loaded at once, and, while being prepared for its trip, took fire and was burned. In an action on the policy for the loss of the boat, held, that the permission to navigate the river below St. Louis was rather a limitation



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Schroeder v. The Stock and Mutual Ins. Co.

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upon plaintiff than a provision for the commencement of the risk, and was somewhat in the nature of an exception in favor of the insurance company, and should be construed most strongly against it. It should not be so applied as to contradict the express agreement as to the time of the commencement of the risk. *Held*, further, that if it appeared in evidence that plaintiff, when he obtained the policy, falsely represented the barge as already loaded and coming down the river, such representation would avoid the policy.

*Error to St. Louis Circuit Court.*

*Voorhies & Mason*, for plaintiff in error.

I. This policy is not a time policy, and no proper construction can make it such, for the reason that no time is named or limited. (1 Pars. on Mar. Ins. 312; *May v. Modigliani*, 2 Dunn & East, 30; *Wooldridge v. Boydell*, H. Bl., C. B., 231; *Robertson v. French*, 4 East, 130.) Upon every fair and legal construction of the language of that policy, the risk was to begin when the barge was towed from the port of St. Louis. But the petition alleges that the cargo never got to St. Louis. It was destroyed before it came within the terms of the policy. Nor was there any loading at St. Louis. This annuls the policy. (*Hudgson v. Richardson*, 1 W. Bl. 463; 3 Burr. 1477; 2 Pars. on Mar. Ins. 49; *Homeyer v. Lushington*, 15 East, 46; 4 East, 130; *Grant v. Paxton*, 1 Taunt. 463; *Park v. Hammond*, 6 Taunt. 495; *Graus v. Marine Ins. Co.*, 2 Caines, 339; *Scriber v. Ins. Co. of N. A.*, 2 Wash. C. C. 107; *Richards v. Marine Ins. Co.*, 3 Johns. 307; 1 Pars. on Mar. Ins. 441, and cases cited, note 1.)

II. The policy on the cargo contains a warranty that the ice was, at the time of the issuing of the policy, loaded on board the barge. It is a declaration by the assured that the ice is loaded. (1 Pars. on Mar. Ins. 337; *Williams v. New England Mut. Ins. Co.*, 31 Maine, 219; *Stout v. City Fire Ins. Co.*, 12 Iowa, 371; *Chaffee v. Cataaugus Ins. Co.*, 18 N. Y. 376.) The contract was avoided under the warranty, or, more properly speaking, there was no contract, since there was no subject-matter for a contract. (*Blackhurst v. Cockrell*, 3 T. R. 360; *Newcastle Fire Ins. Co. v. Macmoran*, 3 Dav. 255, 262; *Duncan v. Sun Fire Ins. Co.*, 6 Wend. 488; *Pawson v. Watson*, Cowp. 785; *DeHahn v. Hartley*, 1 T. R. 343; 2 T. R. 186; *Kirby v. Smith*, 1 B. & A.



861; *Fillis v. Bratton*, cited in *Park* on Ins. 414; 1 *Pars.* on *Mar. Ins.* 337.)

*Haeussler*, and *Jones & Davis*, for defendant in error, cited 2 *Duer* on Ins. 689, § 31; *N. Y. Firemen's Ins. Co. v. Walden*, 12 *Johns.* 513; *Mackwell v. Fraser*, *Doug.* 260; *Shirley v. Wilkerson*, *id.* 396; *Willes v. Glover*, 1 *New R.* 14; *Littledale v. Dixon*, *id.* 151; *Longstr v. Delafield*, 1 *Johns.* 522; *Margatroid v. Crawford*, 3 *Dall.* 491; *Marshall v. Union Ins. Co.*, 2 *Wash. C. C.* 357; *Livingston v. Maryland Ins. Co.*, 6 *Cranch*, 274; *Maryland Ins. Co. v. Rudens*, *id.* 338; 1 *Pet.* 170; *Hodgson v. Richardson*, 1 *Black*, 289; *Hull v. Cooper*, 14 *East*, 479.

BLISS, Judge, delivered the opinion of the court.

Defendant's agent in St. Louis issued to plaintiff two policies of insurance for \$2,000 each, one upon his ice barge and one upon the cargo. The policies were issued while the barge was lying at plaintiff's ice-house opposite Alton, ready to be loaded. It was loaded at once, and, while being prepared for its trip, took fire, and both barge and cargo were lost.

The chief controversy concerns the construction of the policies, the defendant claiming that they were not to operate until the barge reached St. Louis. The cargo policy causes the plaintiff "to be insured, lost or not lost, in the sum of \$2,000 on his cargo of ice, seven hundred tons, more or less, contained in the barge *Charles*, of Alton; to be towed by steamboat from St. Louis, Missouri, to *Helena*," etc., \* \* \* "beginning the adventures upon said property from and immediately following the loading thereof on board of said boat," etc.

The obvious intention of the parties was that the insurance should operate upon the ice when loaded, and to provide in the contemplated trip that the barge should be towed from St. Louis to its destination. If loaded above St. Louis, it might be brought down in any proper way, but when there it must take a steamer. If the written portion were inconsistent with the printed, the application of the well-known rule would be considered; but there is no inconsistency, and both are effective. In holding that

the policy, by its terms, covered the cargo when destroyed, the court committed no error.

In the policy issued upon the barge the intention of the insurer is not so clear. The company causes "John C. Schroeder to be insured in the sum," etc., "lost or not lost, upon the barge Charles, for the term of —, wherever she is in safety at noon on the 26th day of March, 1868, and from thence to noon on the — day of —, 18—, when this policy shall expire, unless," etc.; "with permission to navigate *the Mississippi river from the city of St. Louis to Helena*," etc., etc. The written portion of the policy is indicated by *italics*, and it will be seen that the date of the commencement of the risk is given in writing, the same as the points upon the river between which the barge was permitted to run.

The time of the commencement of the risk is so far made plain and unequivocal by filling the blanks left for that purpose, while others provided for inserting its termination are unfilled, for the reason that it was made to depend upon the arrival of the boat at its destination. The omission to fill them in one case shows that the filling in the other was intentional.

The permission to navigate the river from St. Louis below, is rather a limitation upon the plaintiff than a provision for the commencement of the risk. It neither says nor implies that it shall begin at St. Louis, but may imply that the barge, in its navigation, must be confined to the river between the points named; and even this is inconsistent with the situation of the barge and its destination. It would be more reasonable to suppose that the limit of the commencement of the trip at St. Louis was an inadvertence, and arose from the fact that the policy was drawn there; that it absorbs the smaller places in its neighborhood; that the barge was to be towed by a steamer from that point; and that the principal trip was in the great channel that starts from St. Louis below. This implied limitation is somewhat in the nature of an exception, and should be construed most strongly against the party who makes it (1 Duer on Ins. 161, § 6), and should not be so applied as to contradict the express agreement as to the time of the commencement of the risk.

The defendant sought to prove that the plaintiff, when he obtained the policy, falsely represented that the barge was already loaded; that it was then coming down the river; and upon this matter several witnesses were examined, and the testimony was very contradictory. As to the only alleged misrepresentation that could affect the construction of the policy—to-wit: that the barge was then on the river near noon of the 26th of March, when the policy was to take effect—the court, at the instance of defendant's counsel, instructed the jury that if they found such misrepresentation to have been made it would avoid the policy, and they must find for defendant. And the court might well so hold; for it would not only be a statement of a fact that, if true, would obviously diminish the risk, but it would be a representation—an extrinsic fact—that would aid construction, and show that the intention was to insure from St. Louis only.

The court refused, however, to instruct the jury that a misrepresentation as to whether the boat, where it was lying, was already loaded at the date of the policy, or to be loaded, should be held to be a material one, leaving that question to the jury; but, as a guide to its deliberations, instructed them, as a matter of law, that a false representation, to avoid a policy, must be a false statement of facts tending to diminish the risks—a false representation in regard to matters the insured is justified in treating as materially affecting the risks assumed. In this the court was also right; for whether a given false statement be material or not, is in general a question of fact, and should be left to the jury, as it was in this instance, under instructions, (See 2 Duer on Ins. 689, § 1, and note.) The court committed no error in the instructions, and the facts were found for the plaintiff.

The judgment is therefore affirmed; the other judges concurring.

H. H. COHEN, Respondent, v. JOHN P. CAMP *et al.*, Appellants.

1. *Judgment—Satisfaction, acknowledgment of, when authorized—May be set aside, how.*—A judgment can not be set aside after the term at which it is rendered, but an entry of satisfaction, made subsequent to the term, may be. The acknowledgment of satisfaction is merely evidence of payment, and, if made *bona fide* and correctly, forever discharges and releases the judgment or decree. But as between the parties, if made unauthorizedly or by mistake, it may be canceled or set aside on motion.

*Appeal from St. Louis Circuit Court.*

*I. T. Wise, for appellants.*

I. The court had no power to set aside or annul its proceedings and record made at a prior term. The judgment was by the order "forever discharged and released." The court, at a subsequent term, had no power to re-examine the cause, or the sufficiency or the insufficiency of the reason of the court's action at a former term. (1 Wagn. Stat. 792, § 23; *Ashby v. Glasgow*, 7 Mo. 321; *Harrison v. State*, 10 Mo. 687; *Hill v. St. Louis*, 20 Mo. 584; *Brewer v. Dinwidie*, 25 Mo. 351; *Harbor v. Pacific R.R.*, 32 Mo. 423; *Smith v. Best*, 42 Mo. 185.)

II. A judgment satisfied, of record and without irregularity, can not be revised, even by consent. (*Bynum v. Murrell*, 8 *Humph.* 701.)

III. The satisfaction of the judgment entered of record can not be impeached collaterally, and the record entry of satisfaction is conclusive. Even if it could be reached by direct proceedings in equity, it is absolute proof of payment so long as it stands a part of the record. (*Pratt v. Jones*, 22 *Verm.* 344; *Packard v. Hill*, 7 *Cow.* 434; *Dimick v. Brooks*, 21 *Verm.* 579.)

*H. A. Haeussler, for respondent.*

WAGNER, Judge, delivered the opinion of the court.

The respondent recovered judgment against the appellant in the Court of Common Pleas of St. Louis county, at the September term thereof, 1854. Suit was brought on the judgment at the



April term, 1867, in the Circuit Court of said county. The petition averred that the judgment was still due to the plaintiff, and that it remained unpaid and unsatisfied. These allegations were denied in the answer. It appears that satisfaction had been entered of record. Whilst the suit was still pending and undecided, the respondent caused a notice to be served on the appellant that he should move at a certain time to have the satisfaction set aside and canceled. Upon the hearing of the motion and evidence introduced, the court ordered that the satisfaction be set aside, and then rendered judgment for the respondent.

The counsel for the appellant has collected and cited the cases decided in this court showing that a judgment can not be set aside after the term at which it is rendered. This proposition is undisputed. But the answer is, that the entry of satisfaction was not made at the term at which the judgment was taken, and forms no part of it. The acknowledgment of satisfaction is merely evidence of payment, and, if made *bona fide* and correctly, forever discharges and releases the judgment or decree. But as between the parties, if made unauthorizedly or by mistake, it may be canceled or set aside on motion.

The case of Bynum v. Murrell, 8 Humph. 701, cited and relied on, does not assist the appellant. There it appears that Murrell had obtained two small judgments against Bynum, before a justice of the peace, and on the 3d day of November, 1842, Bynum paid to John S. Murrell, the agent of the plaintiff, a sum sufficient to discharge one of the judgments in full, leaving a balance to be applied toward the satisfaction of the other; and thereupon satisfaction of the judgment thus discharged was entered by the justice upon his docket. Some time afterward, John S. Murrell, the agent of the plaintiff, having other lands belonging to his principal in the hands of Bynum, who was a constable, moved for judgment against him, before the same justice who rendered the judgment and entered the satisfaction before mentioned; and on the hearing Bynum proposed that the payment made in November, 1842, and which had been previously applied to the entire satisfaction of one of said judgments and the partial satisfaction of the other, should be appropriated to the



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Fox et al. v. Webster.

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claim on account of which judgment on motion was sought, and that the satisfaction of the first-named judgment should be made void; and the justice being of the opinion that this might be done, and the parties assenting thereto, the entry of satisfaction of said judgment was canceled and obliterated by the justice. The court held that the judgment having been once fully satisfied by the voluntary act and agreement of the parties, was thereby utterly and forever extinguished, and could not again be resuscitated or set on foot by any act of the parties, and that to permit matters of record or *quasi* of record to be obliterated and destroyed in the mode pursued would be fraught with the most dangerous consequences.

In the above case there had been full and complete satisfaction that operated as a total extinguishment or annihilation of the judgment; the parties attempted to destroy or obliterate the record to accomplish their purposes. But in the present case a different state of facts exists, and the party pursued his remedy in a different mode. The judgment was never paid off or extinguished, but the acknowledgment of satisfaction was unauthorized and made by mistake. The proceeding was not by undertaking to destroy or obliterate the records, but in a regular manner before a court having jurisdiction and competent to act.

I think the judgment should be affirmed, and with the concurrence of the other judges, it will be so ordered.

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OSMOND FOX *et al.*, Respondents, *v.* BENJAMIN F. WEBSTER,  
Appellant.

1. *Fraudulent conveyances — Conspiracy — Fraudulent intent — Facts showing, should go to the jury.* — A. being in embarrassed circumstances, agreed with B. to make time purchases to the extent of his credit, and turn over the property to B. under pretense of sale, but the consideration being in fact merely colorable and fictitious. B. was then to negotiate a compromise with A.'s creditors and afterward divide the profits with A. In replevin by the vendors for a portion of the goods so turned over by A., it appearing that they were bought after the formation of the conspiracy, *held*, that such facts were evidence which ought to go to the jury, tending to show the existence of a fraudulent intent on the part of A. at the time the purchase was made.

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Fox et al. v. Webster.

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Nor did the fact that a secret purpose was entertained of forcing an ultimate compromise, by which some part of the purchase money might in the end be paid, at all mitigate the character of the fraud.

2. *Practice, civil—Pleadings—A general allegation of fraud is sufficient.*—It is sufficient if a petition allege fraud generally, without going into its history and details.
3. *Sales—Intention to defraud vitiates a sale.*—The preconceived design on the part of the vendee of not making good to the vendors the purchase money entering into the transaction, vitiates the purchase and gives the vendor a right of rescission.
4. *Evidence—Depositions—Objections to form of testimony must be made, when.*—Under the rules of the St. Louis Circuit Court, objections to the form of questions propounded to witnesses in the taking of depositions must be taken on the examination, or they will be treated as waived. The statute relating to depositions (Wagn. Stat. 528, § 30) does not affect the rule. The "competency and relevancy" therein referred to point to the substance of the testimony sought to be elicited, and not to the mere form of the question.

*Appeal from St. Louis Circuit Court.*

*Pattison, and Rankin & Hayden, for appellant.*

I. The mere fact that Cozzens & Co. were insolvent, and that they knew themselves to be so, and that they concealed that fact from the plaintiffs—supposing such facts to be proved—do not furnish ground for the rescission of the sale. (Hill. on Sales, 307; 2 Pars. on Cont. 270; Sto. on Sales, § 176.) The cases all hold that the design which will vitiate the sale and render it null, is one not to pay for the goods at all—to get them for nothing. (Kirby v. Wilson, M. & Moore, 181; Bristol v. Wismore, 1 B. & C. 514; Ash v. Putnam, 1 Hill, 305; Acker v. Campbell, 23 Wend. 272; Smith v. Smith, 21 Penn. 369.)

II. As a ground of recovery, a general allegation of fraud is not sufficient. It is true, this court has held that where fraud is set up as a defense, then it may be alleged generally. (See Montgomery v. Tipton, 1 Mo. 446; Pemberton v. Staples, 6 Mo. 59; Edgell v. Sigerson, 20 Mo. 494.) But in Hill v. Miller, 36 Mo. 182, the petition contained a general allegation of fraud, and this court held it to be insufficient. This is in harmony with the case in 9 Mo. 182.

*Hitchcock & Lubke, for respondents.*

CURRIER, Judge, delivered the opinion of the court.

The plaintiffs sue in replevin to recover possession of thirteen cases of cigars. The defendant controverts the plaintiffs' title, and alleges that the cigars were by them sold and delivered to James G. Cozzens & Co., and that Cozzens & Co. thereby acquired the legal title to said cigars and a right to their possession. The defendant claims title under Cozzens & Co. as their assignee in bankruptcy.

The plaintiffs' replication to defendant's answer admits the sale to Cozzens & Co., but avers, in avoidance of it, that the sale was fraudulently procured, and that the plaintiffs seasonably repudiated and disaffirmed it.

1. At the trial below, after the evidence for the plaintiffs was closed, the defendant asked an instruction, which was refused, to the effect that the plaintiffs could not recover. The instruction is based on the theory that the evidence failed to show any intent on the part of Cozzens & Co., existing at the date of the purchase, to cheat and defraud the vendors.

The case shows this general state of facts: Cozzens & Co. being in embarrassed circumstances, entered into an arrangement with one McCreery, which had for its object, among other things, the ultimate discharge of the former from their firm liabilities. It was agreed between the parties to the arrangement that Cozzens & Co. should make time purchases to the extent of their credit, and then turn over the property thus acquired to McCreery, through the forms and under the pretense of a sale to him for a valuable and adequate consideration, but it was prearranged that the consideration should in fact be merely colorable and fictitious. It was also further arranged that McCreery, after he should thus acquire the property, should negotiate a compromise settlement with Cozzens & Co.'s creditors, and then divide the ultimate profits of the enterprise with his associates. These general facts are not disputed; nor is it doubted that Cozzens & Co. proceeded to make the contemplated purchases, turning over to McCreery the results, in accordance with their prearrangement with him. Among the property thus transferred was that which forms the

subject-matter of this suit. There was evidence tending to show that the cigars sued for were purchased subsequently to the formation of the conspiracy. If so — and that was a fact for the jury to find — there was evidence enough to carry the case to the jury on the question of the existence of a fraudulent intent on the part of Cozzens & Co. at the time the purchase was made. Nor does the fact that there was a secret purpose entertained of forcing an ultimate compromise, by which some part of the purchase money might in the end be paid, at all modify, mitigate, or soften the character of the fraud. The conspiracy arrangement discloses a purpose on the part of Cozzens & Co. never to pay their debts in full. The unpaid balance remaining after the contemplated compromise, it was the purpose of the vendors never to pay at all. That was a central idea in the fraudulent scheme.

2. Much criticism of an instruction given at the instance of the plaintiffs is indulged in on the part of the defendant's counsel. The instruction directed the jury that if they found certain facts, and also that Cozzens & Co. bought the cigars with a predetermined design never to pay for them, their verdict should be for the plaintiffs. The instruction is not objected to as containing an incorrect legal proposition, but as being inapplicable to the case, and as being based on a theory of fraud not disclosed in the pleadings.

In reply to this objection, it is sufficient to say that it was not necessary that the pleadings should disclose any particular theory of fraud. It was sufficient to allege fraud generally, without going into its history and details, which it is often very difficult to do. Fraud usually consists of many incidents and circumstances, which are liable to run into such detail and complication that a minute statement of them would not only be inconvenient in a pleading, but perhaps in some cases quite impracticable. It has, therefore, been repeatedly held by this court that a general allegation of fraud in a proceeding at law is sufficient. (11 Mo. 317; 6 Mo. 59; and see opinion of the court in *Edgell v. Siger-son*, 20 Mo. 495.) These decisions were in cases where fraud was alleged as a defense, which is practically the position of the

plaintiffs here, as regards the contract of sale set up in the defendant's answer. They allege fraud as a defense against that contract and its consequences. But it is not so entirely clear that the plaintiffs' replication is open to the criticism made upon it, when fairly construed. It alleges that it was the intent and design of the parties to the conspiracy to procure the sale in question fraudulently and so as to "cheat and defraud the plaintiffs" out of their property "and the value thereof." What is this, in effect, but an allegation that the purchasers bought the property with the preconceived design of not paying for it? The preconceived design to cheat the plaintiffs out of their property and its value, involves the idea of a preconceived design of not making good to the vendors the purchase money; and that preconception entering into the transaction vitiated it, and gave the vendors a right of rescission, which they appear to have acted upon with promptitude. (*Ash v. Putnam*, 1 Hill, 302.)

3. No error is discovered in the action of the court in admitting or excluding testimony. Under the rules of the St. Louis Circuit Court, objections to the form of questions propounded to witnesses in the taking of depositions must be taken on the examination, or they will be treated as waived. The statute in relation to depositions (*Wagn. Stat.* 528, § 30) has no bearing on this inquiry. The competency and relevancy there referred to point to the substance of the testimony sought to be elicited, and not to the mere form of a question.

We discover no radical defects in the plaintiffs' pleadings, or error in the action of the court which would justify a reversal of the judgment, and it will consequently be affirmed. The other judges concur.



HENRY B. GRAHAM *et al.*, Respondents, *v.* THE UNITED STATES  
SAVINGS INSTITUTION, Appellant

1. *Bills and notes*—Collector, as such, has no power to indorse and collect checks.—Authority given to a collector to receive checks in lieu of cash, in payment of bills held for collection, does not confer authority to indorse and collect the checks. When he received the checks payable to his principals, his duty as collector ceased. His next duty was to account to his employers for the proceeds of his collections and turn over the checks to them to be disposed of as they might judge proper. The indorsement of the checks was no incident of the collection of the accounts.

*Appeal from St. Louis Circuit Court.*

*Slayback & Haeussler*, for appellant.

The checks were not payment, and Dixon had not complied with his duty as collector until he had got the money. (*Ward v. Smith*, 8 Am. Law Reg. 69, 70; *Sherer v. Green*, 3 Cal. 419; *Keney v. Hazeltine*, 6 Humph. 62; *Cooney v. Wade*, 4 Humph. 444.) His authority carried and included, as an incident, all the powers which were necessary and proper, or usual, as means to effectuate the purpose for which it was created. (Sto. on Agency, §§ 97, 102; *id.*, § 451; *Haskins v. Johnson*, 5 Sneed, 469; *Woodford v. McClanahan*, 4 Gilm., Ill., 90; *Pres., etc., v. Cornen*, 37 N. Y. 320; *Lucas v. City*, 7 Cal. 473; *Combs v. Hann. Savings & Ins. Co.*, 43 Mo. 148.)

*T. A. & H. M. Post*, for respondents.

Dixon had no authority, by virtue of his position as clerk and collector, to indorse and collect checks payable to plaintiffs' order. (*Terry v. Fargo*, 10 Johns. 114; 1 Pars. on Bills and Notes, 106; *Murray v. East India Co.*, 5 B. & A. 205.) The authority to collect is not authority to indorse. (1 Pars. on Bills and Notes, 106; *Esdaile v. La Nause*, 1 Young & Cole, 394; *Hogg v. Smith*, 1 Taunt. 347; *Kilgour v. Finlayson*, 1 H. Bl. 155; *Hay v. Goldsmith*, 2 Smith, 79; *Byles on Bills*, § 22 *et seq.*; Sto. on Agency, §§ 62-8, 98-9, 105.)

CURRIER, Judge, delivered the opinion of the court.

This suit is brought to recover the amount of two checks which were drawn on the defendant by third parties in favor of the plaintiffs and made payable to their order. The drawers delivered the checks to the plaintiffs' collecting agent, one Dixon, in settlement of certain bills which the latter had in charge for collection, being bills due from the drawer of the checks to the plaintiffs. Dixon indorsed the defendant's firm name upon the checks and presented them at the bank and drew the money upon them, which he seems to have appropriated to his own use, without rendering any account thereof to the plaintiffs. Thus far there appears to be no serious controversy about the facts.

If Dixon had authority, general or special, to indorse the checks in the manner stated, or the defendant was authorized to pay them without the personal indorsement of the plaintiffs, it is not contended that the defendant would be liable in this action. The verdict of the jury, however, negatives the supposition of the existence of any such express authority. The defendant nevertheless undertakes to deduce the authority from the nature and character of Dixon's general agency in making collections and the transaction of business in behalf of the plaintiffs. Their chief complaint of the action of the court below is founded upon the refusal of the court to give the following instruction, namely: "If the jury believe from the evidence that Charles Dixon was, at the times stated in the petition, the clerk and collector of the plaintiffs, and that, as such, he received from the plaintiffs, among other accounts for collection, two accounts, one against Kramer & Loth, and one against Erfort & Petring, and that he was fully authorized and empowered to receive payment of and receipt said bills or accounts, and that, in pursuance of his duties and authority, he received in payment of such accounts the checks set out in the petition, and afterward collected the money on said checks from defendant, in accordance with his authority to collect said accounts, then they will find for the defendant."

The logic of this instruction is that Dixon was authorized to indorse and collect the checks since he was authorized to receive

them in lieu of cash in payment of the bills he held for collection. The deduction is a *non sequitur*. The checks required the bank to pay the sums therein specified to such person as the payees might direct. But the payees never directed payment to be made to any one, unless Dixon was their agent for that purpose; and such agency is not inferable from the mere fact that he was their agent in effecting the collection, nor from all the facts recited in the instruction. His primary duty was to collect the bills, not the checks given in adjustment of the bills.

The question presented is purely one of agency. Was Dixon the plaintiffs' agent to indorse negotiable paper given in settlement of debts due to his employers? He was their agent to adjust such claims and receive the amounts due upon them, and to do those subordinate and incidental things usual and customary in the accomplishment of the main purpose had in view, to-wit: the collection. That main purpose had been accomplished when he had received the checks payable to his principals. His duties as a collector ceased at that point. His next duty was to account with his employers for the proceeds of his collections, and turn over the checks to them, to be disposed of as they might judge proper. The indorsement of the checks was no necessary incident of the collection of the accounts. The instruction was, in my opinion, properly refused. So was the defendant's second instruction. It traveled out of the issues made by the pleadings. At the instance of the defendant, the court directed the jury to find for it in case they found from the evidence that Dixon was authorized to collect and receive payment of checks payable to plaintiffs at the time the checks in question were presented and paid. This fairly presented the real point in controversy, and in the form selected by the defendant's counsel.

The judgment will be affirmed. The other judges concur.

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Hays v. Warren.

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JOSHUA C. HAYS, Appellant, v. ISAAC S. WARREN, Respondent.

1. *Marking initials—Agency—Liability—Bailments—Goods sold on commission, mistake in.*—In suit for the proceeds of certain goods forwarded defendants for sale on commission, where it appeared that through inadvertence plaintiff's agent marked them with the initials of the wrong consignor, and that, consequently, defendant paid the proceeds of the sale to the wrong person, plaintiff would not be entitled to recover. And evidence would be admissible to show that plaintiff had been well known by a name bearing other initials than those marked on the goods.

*Appeal from St. Louis Circuit Court.*

*Hudgens & Son*, for appellant.

I. A commission merchant or warehouseman is bound to know his principal, and if he sells goods and pay the proceeds to the wrong party, either by mistake or negligence, he is still liable to the true owner. (*Dufour v. Mephram*, 31 Mo. 577; *Edw. on Bail*. 286; *Willard v. Bridge*, 4 Barb. 361; *Sto. on Bail*, § 450.)

II. The admission of testimony as to how Joshua Craig Hays and Christopher Hays were known in their neighborhood was irrelevant to the issue as to who was the true owner of the hemp, and its proceeds and its admission were error, and formed the basis of the instruction given by the court, which also erred.

*Crews & Laurie*, for respondent.

CURRIER, Judge, delivered the opinion of the court.

The defendants are commission merchants doing business in St. Louis, and, as such, received from the plaintiff certain consignments of hemp, which they sold and disposed of in the usual course of business. This suit is brought to recover the proceeds of sixty-six bales of this hemp, which the plaintiff claims have never been accounted for. The judgment below was adverse to the claim, and the plaintiff brings the cause here by appeal.

As matter of law, it is contended by the plaintiff that a commission merchant is bound to know his principal, and that if he pays the proceeds of sales of goods consigned to him to the wrong party, through negligence or mistake, he will, notwith-



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Hays v. Warren.

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standing such payment, be accountable to the true owner; and so the court, for substance, declared the law to be. I fail to see, therefore, that the plaintiff has any cause of complaint on that ground. But the plaintiff's legal proposition, as also the instructions of the court embodying the principle contended for, fails to present, with directness, the real turning point of the case. That point was not whether the defendant had paid to the true owner, or whether he had made a mistake as to the true owner, but whether he was warranted in paying the money to the party who in fact received it. That the money was paid to the plaintiff's brother, Christopher Hays, does not appear to be a matter of dispute.

The case shows that both these brothers were hemp producers of Lafayette county, Missouri; that they consigned their productions to the defendants for sale on commission, both shipping from the same point in Lafayette county, and through the same warehouseman. There was also evidence tending to show that the plaintiff, a short time before the shipments in question, called on the defendants in St. Louis and informed them that his agent at Waverley, Barnett, would forward his hemp for sale, marked "J. C. H." "J. C. H. F.," such marks indicating that the hemp so marked was his and should go to his credit. It further appeared that Barnett, inadvertently or otherwise, shipped a portion of the plaintiff's hemp with the marks "C. H." and "C. Hays" upon it, and that the bill of lading contained a direction to the effect that the hemp marked "C. H." and "C. Hays" was for account of C. Hays; that the defendants received and treated the hemp as the property of Christopher Hays, and that they paid over the proceeds to him accordingly. The court admitted evidence over the plaintiff's objections which tended to show that the plaintiff was well known to the defendants, and had been for many years, as J. C. Hays, his name being Joshua Craig Hays, and that he was so known and recognized in the community where he resided in Lafayette county; that the plaintiff's brother was also well known to the defendants, and in Lafayette county, as C. Hays, or Christopher Hays, being sometimes called "Kit," or "Kit Hays;" that the plaintiff's agent,



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Anderson v. Moberly.

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Barnett, was fully aware of these facts, and that he shipped the plaintiff's hemp to the defendant with a full knowledge of the names and designations under which the two brothers were known.

We think this evidence was competent as tending to show who was at fault in the transaction, and the true source and origin of the difficulty which the case discloses. The evidence being admissible, it was proper to base an instruction upon it, to the effect that if the plaintiff's agent shipped the hemp to the defendants for account of C. Hays, marked and designated as already stated, having good reason to know that the defendants would understand such marks and directions as pointing to Christopher Hays as the owner of the hemp, and entitled to its proceeds, and that they would be likely to deal with the hemp and proceeds upon that supposition, in consequence of such marks and bill of lading directions, then the finding should be for the defendants, provided the other hypothecated facts were also found to be true. The theory of law propounded in the instruction is reasonable and just. The practical effect of an opposite view would be to subject consignees to fraud and imposition most unreasonably. The whole difficulty disclosed in the case before us manifestly originated with the plaintiff's agent at Waverley; and the plaintiff, not the defendants, is responsible for his acts.

I think the judgment should be affirmed. The other judges concur.

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THOMAS S. ANDERSON, Plaintiff in Error, v. WILLIAM E.  
MOBERLY, Defendant in Error.

1. *Practice, civil*—*Appeal will lie only on final judgment.*—In a suit on a note, the answer alleged certain facts as a defense to so much of plaintiff's claim as called for interest. Plaintiff demurred to this defense, and the demurrer was overruled; and no reply being filed to the new matter set up in defense, judgment was entered on it as confessed. From this final judgment no appeal was taken; but after the cause had been heard on its general merits, and final judgment had been rendered, the case was appealed on the judgment on demurrer. *Held*, that such an appeal would not lie. When a demurrer goes to the entire cause of action or ground of defense, and the party chooses to stand upon it notwithstanding an adverse ruling, he may do

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Anderson v. Moberly.

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so, and allow final judgment to go against him upon the whole case, taking his appeal from such final judgment. He can not, however, divide the case into parts and carry it up in fragments, and especially when the final judgment is allowed to stand unaffected by the appeal.

2. *Appeal*.—An appeal on writ of error, to be effective, must operate upon a final judgment, and not upon one interlocutory in its character.

*Error to St. Louis Circuit Court.*

*Jones & Anderson*, for plaintiff in error.

I. No final judgment is necessary. (8 Mo. 619; State v. Gregory, 38 Mo. 501; State v. Hawkins, 39 Mo. 432; Kelsy v. Western, 2 N. Y. 501, and authorities there cited.)

II. There were in the court below two distinct judgments—one for the defendants upon the issue of law raised by the demurrer, that the plaintiff recover no interest, and the other upon the issue of facts, which was for the plaintiff, that he recover the principal of his bond. The appellate court will review those against him, upon his appeal, without noticing those against him to which no error is assigned. (Dunn v. Price, 11 Leigh, 203; Everard v. Patterson, 6 Taunt. 645; Campbell v. French, 6 T. R. 200.) Judgment upon any one of these defenses can be reviewed just as judgment upon one count in a declaration. (Beecher v. Conratt, 11 How. Pr. 181; Stevenson v. McNutt, 27 How. 335; Griffin v. Cranston, 5 Bosw. 658, 665; D'Ivernois v. Leavitt, 8 Abb. 59-63.)

*Ewing & Holliday*, for defendant in error.

Plaintiff did not appeal from the final judgment.

CURRIER, Judge, delivered the opinion of the court.

A final judgment, as defined in the statute, is that which determines finally the rights of the parties to the action, and is the only judgment from which an appeal lies. (Wagn. Stat. 1051, § 1; *id.* 1059, § 9.) The same rule applies to writs of error. (*Id.* 1064, § 1.) The appeal or writ of error, to be effective, must operate upon the final judgment itself, and warrant its reversal if ground of reversal be found in the record. But the

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Anderson v. Moberly.

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appeal in this cause was not taken to reverse the final judgment, but to reverse a prior judgment, interlocutory in its character, upon the plaintiff's demurrer to one of the defenses set up in the defendant's answer to a portion of plaintiff's cause of action. It is the latter judgment that the plaintiff complains of and seeks to reverse. The final judgment was in his favor, and was not appealed from by either party, and seems, therefore, to have been acquiesced in by both. The answer alleges certain facts as a defense to so much of the plaintiff's claim as calls for interest on the note set out in the petition. The plaintiff's demurrer to this particular ground of defense was overruled, and the new matter alleged in defense, in the absence of any reply thereto, was taken as confessed, the court entering a judgment to that effect. From this judgment the plaintiff took his appeal to the St. Louis Circuit Court, sitting in general term. The appeal, however, was not taken until the cause had been heard upon its general merits, and a final judgment was rendered therein for the plaintiff. The appeal, however, is strictly limited to the "judgment herein on demurrer." It is conceded by the plaintiff's counsel that no appeal would lie from this judgment until a final judgment had been rendered in the cause. But if the judgment on the demurrer was such a final judgment that an appeal would lie from it at any stage of the proceedings, why wait for any other final judgment? How many final judgments may be had in the same cause and between the same contending parties?

When a demurrer goes to the entire cause of action or ground of defense, and the party chooses to stand upon it notwithstanding an adverse ruling, he may do so, and allow final judgment to go against him upon the whole case, taking his appeal from such final judgment. He can not, however, divide the case into parts and carry it up in fragments, and especially when the final judgment is allowed to stand unaffected by the appeal. If the demurrer goes to only a part of the defense, as in this case, the party may save his point by appropriate instruction. An abandonment of the demurrer does not necessarily involve an abandonment of the legal propositions embraced therein. If the plaintiff here had presented his proposition of law in the form of an instruc-

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Miller et al. v. Bernecker.

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tion, and the court had refused it, he might, by appropriate subsequent proceedings, have had the action of the lower court, in that particular, reviewed in the appellate court, taking his appeal from the final judgment. Since, however, he took no appeal from the final judgment, but appealed alone from the "judgment herein on demurrer," the appellate court was right in treating the appeal as ineffectual. A dismissal of the appeal would have been the appropriate action for the appellate court to have taken. But its judgment of affirmance accomplishes substantially the same results, and will therefore be sustained. The other judges concur.

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WENDELIN MILLER AND WIFE, Appellants, v. JOHN L. BERNECKER, Respondent.

1. *Res adjudicata*—*Judgment affirmed in Supreme Court for failure to assign errors.*—Where a motion to set aside a sale of land is appealed to the Supreme Court, and for want of assignment of errors the action of the lower court is affirmed, parties are concluded by its disposition; and in event of subsequent proceedings instituted for the same purpose, equity has no power to relieve them.

*Appeal from St. Louis Circuit Court.*

S. Reber and P. C. Morehead, for appellants.

R. S. McDonald, for respondent.

BLISS, Judge, delivered the opinion of the court.

This suit presents another phase of the controversy involved in the proceedings before us in *Bernecker v. Miller*, 44 Mo. 102. It is a proceeding in equity to enjoin the judgment in ejectment then affirmed. The fraudulent conduct of Bernecker in obtaining the judgment in partition in the Court of Common Pleas, described in *Bernecker v. Miller*, 44 Mo. 102, and in purchasing the land, is set forth in the petition as the ground for equitable relief. We held, when that case was before us, that the judgment could not be impeached collaterally, and this is an attempt to

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Miller et al. v. Bernecker.

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show, by a direct proceeding, such fraud in obtaining it that the court will prevent its execution. The petition sets forth the proceeding in the Land Court for partition instituted by Peterson and wife, and also the proceeding in the Court of Common Pleas by Bernecker, and alleges that the last proceeding was without the plaintiffs' knowledge; that if they were served with process, they did not understand its meaning; that they were ignorant and illiterate, neither understanding legal documents and proceedings, nor the English language, but that Bernecker was a shrewd and intelligent man, speaking both English and German. It also shows that after the service of process in the Peterson case, they relied on their brother-in-law, Bernecker, to advise them and take the proper steps to protect their interest in the land, and he, knowing their ignorance and confidence in him, undertook to do so, but, after the institution of the Peterson suit, conceived the design of obtaining their interest in the lands at a nominal price, by taking advantage of their ignorance and confidence in him, and in pursuance of said design instituted said proceedings in the Court of Common Pleas, and they, trusting to him to represent them, gave no heed to the matter; and he, in pursuance of his design to defraud them, concealed from them his proceedings, obtained the order of sale, and bid in the land at \$5 per acre, when it was worth \$100. It also shows that they were wholly ignorant of all those proceedings, and never, in fact, appeared in the suit or authorized any one to appear for them, but trusted wholly to Bernecker to represent them in the matter of dividing the land, and that they did not receive any part of the money, and have ever since kept possession.

The answer denies these allegations, but the evidence sustains them, and shows that the plaintiffs and some of the other heirs were wholly ignorant of what was going on; that they did not know that they were served with process in the proceedings in the Common Pleas, or that there were any such proceedings, until after the sale, and authorized no one to appear for them; that the land, at the time of the sale, was worth from \$80 to \$100 an acre; that Wendelin Miller was very ignorant and illiterate, and he and his wife trusted Bernecker to manage their interests in the lands,



who encouraged them to do so. Two witnesses testify that when reproached after the sale for not telling the plaintiffs and other heirs about it, he replied that he would be a jackass to tell them when he could make something for himself by it.

I have no doubt that enough is shown in this case to authorize a perpetual injunction, unless the plaintiffs are barred by some previous action or opportunity. But, unfortunately, it appears that after the heirs, including the present plaintiffs, had heard of this sale they then employed attorneys to apply to the court to set it aside, and accordingly a motion was filed and heard in said Court of Common Pleas stating many of the grounds set up in this petition and supported by affidavits, which, strange to say, was overruled. An appeal was taken to this court, and for want of an assignment of errors the action of the Common Pleas was affirmed. (32 Mo. 231.) Defendant, Bernecker, sets up this proceeding as a bar to any further investigation into his operations for transferring this estate. So far as that motion covers the equities of this petition, the plaintiffs are concluded by its disposition, notwithstanding it was never presented to the appellate court. That it was not so presented was the fault of plaintiffs' counsel at the time, from the effect of which equity has no power to relieve them. (Sto. Eq., § 895-6, and cases cited; Matson v. Field, 10 Mo. 100; Reed's Adm'r v. Hansard, 37 Mo. 199.)

The great wrong which Bernecker has been enabled to practice upon the plaintiffs and the other heirs, has disposed us to give the most favorable consideration to their claims, both now and when they were before us in another form, as reported in 44 Mo. It did not appear in that record that this motion to set aside the sale was ever made, or that they made any other appearance in the Court of Common Pleas than what was indicated in the order of sale. But they actually did appear, and presented an application which ought to have been granted, and which doubtless would ultimately have prevailed had the matter been prosecuted in this court. That it was not so prosecuted was the fault of the attorney they selected, and after they had discovered the practices of Bernecker and were no longer deceived by him. The main facts set out in this petition were embodied in that motion, and

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Spaunhorst et al. v. Link et al.

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we must ignore every principle of jurisprudence to treat the matter as an open one. If the failure to prosecute this motion had been the result of fraud, or any other cause cognizable in equity, then we should have jurisdiction and could grant relief. But without it, it is not sufficient to show that the parties once had a case, if it also appears that by negligence they have lost their opportunity.

The judgment of the Circuit Court must be affirmed. The other judges concur.

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SPAUNHORST & HACKMAN, Appellants, v. LINK & BIBB,  
Respondents.

1. *Witnesses—Impeachment—Time, place, and circumstance.*—All that is necessary to contradict a witness, by showing that at some other time he has said something inconsistent with his present evidence, is to ask him questions as to the time, place, and person involved in the supposed contradiction. The rule is simply for the protection of the witness, to give him an opportunity to recollect the facts and correct the statements when immediately brought to his mind. And the evidence touching the conversation ought not to be excluded solely on the ground that it took place after the institution of the suit.
2. *Partnership—Retirement of member—New firm.*—Nothing is better settled than that the retirement of any one partner from a firm consisting of any number of partners operates a dissolution of that firm. Though the business may be continued by the successors even under the same name and style, it is a new firm. And the assignment by one partner of his rights to a copartner is, *ipso facto*, a dissolution of that firm; and, further, where one party goes out of a firm, in order to make the debts of the old partnership a charge upon the new there must be the concurrent consent of three parties—the creditors, the old firm, and the new.

*Appeal from St. Louis Circuit Court.*

*Bakewell & Farish*, for appellants.

*Crews, Letcher, and Laurie*, for respondents.

WAGNER, Judge, delivered the opinion of the court.

This was an action instituted by the plaintiffs on a promissory note against defendants, as partners. Judgment was rendered

against Link by default, and Bibb answered, denying the partnership. Under certain instructions the plaintiffs obtained judgment at special term, but this was reversed at general term.

As the question of partnership was a matter of fact, we are precluded from revising the action of the court except so far as its decision was concerned in ruling upon the admissibility of testimony. To prove partnership, Link was introduced as a witness for the plaintiffs, and swore to the existence of the partnership. Upon cross-examination as preliminary to an impeachment of his evidence, and to lay the proper foundation, the counsel for the defendants asked him the following question: "Did you not state to Mr. Sappington, in a conversation with him at your store, in the summer of 1868, that Bibb was not a partner in that store, and never had been?" This question the witness answered in the negative. This further question was then put: "Did you not, in that same conversation with Sappington, in the summer of 1868, tell him that you signed that note to get time, and that you expected to be able to pay it before Bibb found it out?" The witness answered, "No; I never did."

The defense then called Sappington for the purpose of proving the conversation and to show that the witness had made contradictory statements. This was objected to by the plaintiff. The objection was sustained and the evidence ruled out. All that is necessary to contradict a witness, by showing that he has, at some other time, said something inconsistent with his present evidence, is to ask him as to the time, place, and person involved in the supposed contradiction. The rule is simply for the protection of the witness, to give him an opportunity to recollect the facts and correct the statements when immediately brought to his mind. This question was examined and the authorities referred to in the case of *The State v. Starr*, 38 Mo. 279. The interrogatories propounded to the witness as to time, place, and person contained all that was essential to bring the conversation to his recollection, and were abundantly sufficient to let in the contradictory proof. I think, therefore, that the court committed error in sustaining the objection.

The counsel for the plaintiffs urge that the evidence should be

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Spaunhorst et al. v. Link et al.

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excluded because the supposed conversation took place after the institution of this suit; but I am not aware that that makes any difference as regards the veracity of the witness.

It will not be necessary to examine the instructions in detail, but I will briefly state the law which must govern on a new trial. The contest is about a partnership liability. It is alleged that a partnership formerly existed, composed of Link, Hawkins & Bibb, and whilst this firm continued, the goods were bought for which the note sued on was given. After the purchase of the goods, Link purchased the interest of Hawkins, and says that the business was then continued by himself and Bibb. After the withdrawal of Hawkins from the firm, he signed the note in controversy with the names C. G. Link and W. Bibb, for an obligation which was incurred under the prior firm of Link, Hawkins & Co. If there was really a partnership between Link and Bibb, it can not be construed into a continuance of the old partnership previously existing. Nothing is better settled than that the retirement of any one partner from a firm consisting of any number of partners operates a dissolution of that firm. Though the business may be continued by the successors even under the same name, still it is a new firm.

The assignment by one partner of his rights to a copartner is, *ipso facto*, a dissolution of the firm. (Heath v. Sansom, 4 B. & A. 175, per Denman, C. J.) And where one party goes out of a firm, in order to make the debts of the old partnership a charge on the new one formed, there must be the concurrent consent of three parties—the creditors, the old firm, and the new. (Hart v. Alexander, 2 M. & W. 484.) Without a special agreement, which is nowhere alleged or proved, the new partnership could not be made responsible for the debts of the old, and in signing the note Link exceeded his authority.

If a partnership is shown between Link, Hawkins, and Bibb, then Bibb is unquestionably liable on the original cause of action; but unless it be shown that by consent and agreement of all parties the new firm assumed the liabilities of the old, he can not be held in this proceeding.

I think the judgment should be affirmed. The other judges concur.



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The Mutual Savings Institution v. Enslin.

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**THE MUTUAL SAVINGS INSTITUTION, Plaintiff in Error, v. CHAS. ENSLIN, Defendant in Error.**

1. *Practice, civil — Actions — Money paid — Mistake of law.*—Money paid with a full knowledge of the facts, but under a mistake of law, can not be recovered back.

*Error to St. Louis Circuit Court.*

*Chapin*, for plaintiff in error.

Money paid by the plaintiff to the defendant under a *bona fide* forgetfulness or ignorance of facts which did not entitle the defendant to receive it, or under a mistake in law under circumstances that would make it inequitable and unconscientious for the defendant to retain it, may be recovered back as money had and received. (*Kelly v. Solari*, 9 M. & W. 54; 2 Smith's Lead. Cas. 543; *Broome's Leg. Max.* 177, 237.)

*Taussig & Kellogg*, for defendant in error.

Plaintiff acted with full knowledge of all the facts, and therefore is not entitled to relief from a mistake of law. (Chit. on Cont. 490-1; 2 Greenl. on Ev., § 123, note 8; *Tyler v. Smith*, 18 B. Monr. 793; *Marietta v. Slocomb*, 6 Ohio St. 471.)

CURRIER, Judge, delivered the opinion of the court.

This case comes up on an agreed statement of facts, from which it appears that the firm of Koehls & Golberg held a note of some \$430 of one Heiderman, of Peoria, Illinois, which they indorsed in blank, and delivered to the plaintiffs for collection and as collateral security. It appears further that the firm of Koehls & Golberg was subsequently dissolved by mutual consent; that Golberg died a few days after the dissolution, and that Koehls, before any administrator was appointed on Golberg's estate, or rather before the administrator had given a bond authorizing him to deal with the firm affairs, made a written assignment and transfer of the Heiderman note to a firm creditor, in liquidation and settlement of a partnership indebtedness and that the



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The Mutual Savings Institution v. Enslin.

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assignee thereupon notified the plaintiffs of such transfer and assignment of said note. Subsequently, as the agreed statement further shows, the defendant was appointed to administer upon Golberg's estate, and in due time gave the bond required by statute when the administrator of a deceased partner takes charge of the partnership affairs (R. C. 1855, p. 124, § 60), and thereupon demanded of the plaintiffs the Heiderman note or its proceeds, the debt for which it was originally pledged having been paid. The plaintiffs yielded to this demand, and directed the proceeds of the note to be paid to the defendant, therein disregarding the notice which they had received from the assignee claimant under the Koehls transfer.

The defendant accounted with the Probate Court for the fund thus acquired, as constituting a part of the firm assets of Koehls & Golberg, and subsequently paid it out to the firm creditors under and by virtue of an order of that court.

In the meanwhile, and before the fund was finally distributed, Bredow, the assignee under Koehls, sued the plaintiffs for a conversion of the Heiderman note, claiming it as his in virtue of the assignment. The plaintiffs gave the defendant due notice of the pending of that suit, and that they should look to him for reimbursement in case their defense should prove unavailing.

They defended the suit, but judgment went against them for the amount of the note, notwithstanding its proceeds had been paid over to the defendant in this suit. (See *Bredow v. Mutual Savings Institution*, 28 Mo. 181.)

The plaintiff then paid off the judgment and took an assignment of Bredow's claim, and thereupon instituted the present suit against the defendant to recover back the moneys paid to him as above stated. The case has been in this court once before. (See *Mutual Savings Institution v. Enslin*, 37 Mo. 453.)

The agreed statement shows that an error has been committed, by which one of the parties must suffer. The proceeds of the Heiderman note have gone to the benefit of the creditors of Koehls & Golberg twice: once to Bredow, under the judgment of this court; and once to the creditors generally, under the order and direction of the Probate Court. The plaintiffs paid to

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The Mutual Savings Institution v. Enslin.

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Bredow and the defendant, to the general creditors. The plaintiffs thus far are the losing party, and seek to indemnify themselves by a recovering back from the defendant of the amount paid to him, and which he has already paid over to other parties under the orders of the Probate Court. Are they entitled to this recovery? In the notice given to the defendant of the pendency of the Bredow suit, the plaintiffs state, for substance, that the proceeds of the Heiderman note were ordered to be paid over to him "under the supposition" that he was the party "lawfully entitled to receive them." Now, if the plaintiffs paid over to the defendant the proceeds of that note under a mistake of law merely, and not under a mistake of fact, they are not entitled to recover back the money so paid. In assuming to judge of the legal rights of the rival claimants, without referring the matter to the courts, and paying according to their view of those legal rights, they acted at their peril and must submit to the consequences. It is a well-settled principle that money paid under mistake or ignorance of the law, but with a knowledge of the facts, or the means of such knowledge, can not be recovered back from the party to whom it was paid. (2 Greenl. Ev., § 123; Chit. on Cont., 626-7, 7th Am. ed., and see the authorities cited in note 1, p. 628; Tyler v. Smith, 18 B. Monr. 793; City of Marietta v. Slocomb, 6 Ohio St. 471.)

In the case at bar, the plaintiffs appear to have acted with a knowledge of the material facts, and with all requisite means of information. The cause shows that they ordered the money to be paid over to the defendant, with notice of the dissolution by consent of the firm of Koehls & Golberg; with notice of Golberg's death; with notice of the assignment by Koehls to Bredow & Schaffer, and of their claim to the note and its proceeds; and with notice of the appointment of the defendant as Golberg's administrator. With these facts before them, and with ample time for deliberation and opportunity for further inquiry, they ordered the money to be paid to the defendant, "supposing" him to be the party "lawfully entitled to receive" it. They now urge their mistake, and insist that the defendant was not legally entitled to the fund, and pray judgment against him for the

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Mitchell et al. v. Peoples et al.

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amount of it. Under the rule already stated such a judgment would be unwarranted.

But the plaintiffs' counsel cite several authorities (9 M. & W. 54; 2 Smith's Lead. Cas. 543; and Broome's Legal Maxims, 177, 237) in support of the proposition that money paid under a mistake of law may be recovered back where it appears that it would be inequitable and unconscientious for the party receiving the money to retain it. This principle does not help the plaintiffs. They show no superior equity. It is as inequitable for the defendant to lose the money as it is for the plaintiffs to lose it. Both parties acted in apparent good faith, and one must lose. The plaintiffs paid the money to the defendant, or ordered it to be paid to him voluntarily, under a mistake of law, as they now insist. The defendant, having the money in his custody, was ordered by the proper court to distribute it to the creditors of Koehls & Golberg, and did so under the coercion of that order. He at the time had notice, indeed, of the pendency of the Bredow suit, but he acted under the sanction of a judicial order. The case shows no equity in the plaintiffs to take it out of the general rule that money paid with a full knowledge of the facts, but under a mistake of law, can not be recovered back.

In my opinion, the judgment should be affirmed. The other judges concur.

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WILLIAM F. MITCHELL *et al.*, Respondents, *v.* SAMUEL PEOPLES  
*et al.*, Appellants.

1. *Conveyances — Married women — Acknowledgments — Justice of the peace act, 1855.*—Under the act of 1855 (R. C. 1855, p. 363, § 37) a justice of the peace had authority to take the acknowledgment of a married woman to a deed conveying her own real estate. (*West v. Best*, 28 Mo. 551, overruled.)

*Appeal from Fourth District Court.*

*Day & Blair*, for appellants.

*Lipscomb & Givens*, for respondents.

CURRIER, Judge, delivered the opinion of the court.

This is an ejectment suit for a parcel of land in Clark county. At the trial it was "agreed that the plaintiffs and defendants claimed under a common title, to-wit: under and from Elgelina Combs, formerly Elgelina Mitchell, and wife of Harvey Combs; that said Elgelina died on or about the 17th day of December, 1862, without issue, leaving the plaintiffs her heirs at law."

In the progress of the case, the defendants, in order to show title in themselves derived from Mrs. Combs, offered in evidence a deed, duly executed by Mr. and Mrs. Combs, dated November 20, 1862, which purported to convey the disputed premises to one George Layman, a grantee in the defendants' chain of title. The deed was objected to and excluded, as unacknowledged on the part of Mrs. Combs. The acknowledgment of Mrs. Combs appended to the deed appeared to have been taken and certified in due form by a justice of the peace of the county where the land lies. The objection was that an acknowledgment of a married woman, taken by a justice of the peace, was unauthorized, and therefore void and of no force or effect; and so the court held, ruling out the deed. Whether this ruling was correct is the only point presented for consideration upon the record before us.

I should feel no embarrassment in disposing of the case but for the decision of Judge Scott in *West v. Best*, 28 Mo. 551, where it is declared in the opinion of the court, that under the act of 1855 (R. C. 1855, p. 363, § 37) a justice of the peace had no authority to take the acknowledgment of a married woman to a deed conveying her own estate. The decision of the court below was in accordance with that ruling, and must consequently be affirmed, unless the decision in *West v. Best* on this particular point is overruled. Ought that to be done? In my opinion, a fair interpretation of the statute and the most manifest ends of justice demand it.

It is not, perhaps, entirely certain that Judge Scott expressed the views of a majority of the court upon the point under review. He assigns various reasons for a reversal of the judgment he was considering, and among them the supposed non-authority of a

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Mitchell et al. v. Peoples et al.

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justice to take the acknowledgment of a particular deed which appeared in the case. It is clear that some of the reasons assigned were deemed unsound by Judge Richardson, for he gives a very guarded assent to the result reached, impliedly disclaiming responsibility for the accuracy of the grounds on which the decision was placed. He simply concurs in the result without giving assent to the reasons assigned for it.

Judge Napton concurred generally, and it should, perhaps, be taken that he assented to the views of Judge Scott in regard to the supposed want of authority in the justice to take the acknowledgment. However this may be, I am of the opinion that the case, as to that particular point, should be re-examined.

The question raised involves a construction of section 37 of the act of 1855. (R. C. 1855, p. 363, § 37.) That the terms of the act were broad enough to include justices of the peace as among the officers who were thereby authorized to take the acknowledgments of married women, the opinion in *West v. Best* admits. The difficulty in the mind of the judge delivering the opinion seemed to be that the terms were too broad and comprehensive, and he refuses to be bound by "any general terms," however pertinent and applicable to the subject of the act. He says that he will not "presume that by any general terms that was unfixed which had been made firm and stable." But the Legislature is at liberty to declare its will in whatever terms it may choose to select. The true point of the inquiry is, what did the Legislature mean by the terms it employed? A little attention to the history of legislation on this subject will, in my judgment, make its meaning very evident, and will show, beyond reasonable doubt, that the Legislature intended, by the act of 1855, to make a change in the law, and thereby to empower a class of officers to take the acknowledgments of married women, who had not previously been clothed with that authority.

The revision of 1845 (R. S. 1845, p. 225, §§ 35, 37) contained the following sections, to-wit:

"SEC. 35. A married woman may convey any of her real estate, by any conveyance thereof, executed by herself and husband, and acknowledged by such married woman, and certified



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 Mitchell et al. v. Peoples et al.
 

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in the manner hereinafter prescribed, by some court having a seal, or by some judge, justice, or clerk thereof."

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"SEC. 37. Any court, judge, or clerk authorized by this act to take the proof or acknowledgment of any instrument in writing that conveys any real estate, or whereby any real estate may be affected in law or equity, may take and certify the acknowledgment of a married woman to any such conveyance of her real estate."

These sections seem somewhat repetitious, but the primary object of the first evidently was to authorize a married woman to convey her real property by joining her husband in a deed of it, and the sole and only object of the second manifestly was to point out and designate the officers who might take such married woman's acknowledgment. The latter section has no other aim or purpose, and whoever was authorized to act under its provisions was authorized to take the required acknowledgment.

The revision of 1855 contains these indetical sections, with some additional sections embraced therein. (R. C. 1855, p. 362, §§ 35, 37.) Let us attend to the additions or amendments.

Section 35 of the revision of 1845 is so amended by the act of 1855 as to authorize a married woman to convey by attorney a power which had not previously been granted. The tendency of legislation was not to embarrass but to facilitate alienations by married women.

In exact accordance with this tendency, section 37 of the act of 1845 was amended by the act of 1855 so as to facilitate the execution of deeds by married women, by authorizing officers *other* than those specified in section 37 of the act of 1845, to take and certify her acknowledgment. The section, as amended by the act of 1855, reads thus:

"SEC. 37. Any court, judge, justice, or clerk thereof, or *other officer*, authorized by this act to take the proof or acknowledgment of *any* instrument in writing that conveys any real estate, or whereby any real estate may be affected in law or equity, may take and certify the acknowledgment of a married woman to any such conveyance of her real estate, or to any power of attorney authorizing the conveyance of the same."

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Mitchell et al. v. Peoples et al.

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The words "or other officer," and the words "or to any power of attorney authorizing the conveyance of the same," are new, and were introduced into the section for the first time in the revision of 1855, and constitute the amendments of it then enacted.

On turning to the seventeenth section of the same act it will be found that "justices of the peace of the county in which the real estate conveyed or affected is situated" may, under the authority of that section, "take the proof or acknowledgment" of conveyances of real property in their respective counties. It is clear to my mind, therefore, that it was the intention of the Legislature, by the act of 1855, amending the prior act, to furnish to married women fresh facilities for the conveyance of their real property, and to relieve them from the necessity and inconvenience of resorting in all cases to some officer of a court of record to take and certify their acknowledgments. Any other construction makes the amendment of section 37 utterly ineffectual and nugatory—in effect repeals the statute to that extent.

In vindication of the views expressed in *West v. Best*, Judge Scott draws attention to the fact that "justices of the peace had never had, under our statute laws, authority to take the acknowledgments of a conveyance passing the title of a married woman to her land." What possible force can there be in that objection? It is because and for the reason that justices had never before had the authority in question that the Legislature interposed and changed the law in that respect, and conferred a power upon them that they had never before enjoyed. Had they previously possessed the power, there would have been no occasion for amending the law on that subject.

Again, the opinion under review derives the power to take the acknowledgment of a married woman exclusively from the thirty-fifth section; whereas that power is clearly granted in the thirty-seventh section. It is the latter section that is devoted exclusively to that one specific matter, and that undertakes to designate the officer who shall be authorized to act in such cases. It is a little remarkable that its provisions should have been so completely ignored.

Subsequent legislation reflects some light upon the question of the intention of the Legislature in enacting the amendments of

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Mitchell et al. v. Peoples et al.

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1855. The decision in *West v. Best* was made in July, 1859. At the adjourned session of 1863 (Adj. Sess. Acts 1863, p. 27) the attention of the Legislature was drawn to it, and an act was at once passed completely overruling the effect of that decision as to the future, which aimed to cure the possible mischief of it in the past. It undertook to ratify and confirm acknowledgments of married women taken before justices of the peace and notaries public, under the act of 1855. As to its efficiency in this direction we express no opinion.

In 1865 the Legislature recurred to the subject again. The law was remodeled as regards the form in which it was expressed, and the various provisions running through sections 17, 35, 37, and section 1 of the act of February 15, 1864, conferring power on different officers to take acknowledgments, were condensed and combined in one section (Gen. Stat. 1855, p. 444, § 9); the authority of justices and notaries to act in such cases being carefully preserved and continued. There is no longer any chance of misunderstanding the will of the law-making power on this subject.

If, however, the decision in *West v. Best* had become a rule of property in any such sense that a reversal of it would necessarily or probably lead to a disturbance and unsettling of titles, then it should probably stand, however erroneous the original decision might be esteemed to have been. But a reversal can have no such effect. On the contrary, a reversal will serve rather to quiet titles and confirm purchasers in their honest possessions, as the present litigation tends to assure us. In my view, that consideration justifies me in recommending the reversal of a ruling not only erroneous, but productive of what I deem wrong and injustice. I am clearly of the opinion that the decision under review, upon the specific point in question, was erroneous; that it misrepresented the statute, and that an affirmation of it will tend rather to disturb than to settle titles. I therefore recommend that the judgment of the court below which was founded upon that decision be reversed, and that the cause be remanded for a re-trial in accordance with the views herein declared. The other judges concur.

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Meysenburg, trustee of Steinberg, v. Schlieper et al.

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T. A. MEYSENBURG, TRUSTEE OF B. N. STEINBERG, Plaintiff in Error, v. C. W. SCHLIEPER AND CHARLES BORG, Defendants in Error.

1. *Mortgages—Encumbrances—Injunction.*—An encumbrancer has no right to enjoin the sale of the property under a prior encumbrance, unless he is ready and offers to pay off the prior encumbrance in full; more especially when the property is depreciating in value.

*Error to St. Louis Circuit Court.*

*Beal*, for plaintiff in error.

*Woerner & Kehr*, for defendants in error.

After obtaining the injunction, plaintiff failed to redeem or apply for the appointment of a receiver. For that reason alone, if for no other, the injunction was properly dissolved. (Hill. on Injunc. 122, § 127.)

BLISS, Judge, delivered the opinion of the court.

Martin Windeck and F. Lubering, as owners of the Benton brewery and the personal property used in running it, conveyed the same to defendant Borg, as trustee, to secure four promissory notes for \$1,750 each, dated May 28, 1867, and payable in one, two, three, and four years to defendant Schlieper, with interest annually. The deed provided that the property should be kept insured, the improvements kept up, taxes paid, etc.; and in default, among other things, of so keeping it insured or in any payment of principal or interest, the trustee should have the right to sell and pay the whole indebtedness. Previous to this deed, another trust deed had been given to one Barth, but covering only the real estate embraced in the record; and subsequently to it, the said Windeck, as owner of one-half the property, executed a trust deed to the plaintiff. Windeck and Lubering failing to make their payments, Barth, who held the first lien, sold the real estate, and, after paying the indebtedness due his beneficiary, held a surplus of \$3,719 to apply upon the notes belonging to Schlieper; but this sum was not offered

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Meysenburg, trustee of Steinberg, v. Schlieper et al.

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him until his trustee had advertised for sale the personal property embraced in the deed, upon default in the payment of the first note and accumulated interest, and in insuring the property for the benefit of the creditor. After it was so advertised, the \$3,719 and the policy of insurance upon the personal property were tendered to defendant Schlieper, who declined to receive them, and the plaintiff at once filed his petition for an injunction against the sale of the property. Several things are set out in the petition that are contradicted by the evidence; but enough remains to raise the questions whether the plaintiffs have any such interest as to authorize their interference, and also whether the defendants can be enjoined from proceeding with the sale.

The equity, as originally made in the petition, was a clear one, for it charges that defendant Schlieper refuses to receive the surplus from the first sale; that the petitioner desires to pay him his whole claim, in order to extinguish his lien upon the property and let in that of this petitioner; and asks for an account, and that he be permitted to redeem; and avers that defendant, for the purpose of sacrificing the property and buying it in at a nominal price, refuses to receive his pay, and insists upon selling the property under his mortgage. The answer denies any such purpose; expresses a desire to obtain the surplus from the former sale and the balance of the indebtedness; asks that the petitioner be required to pay it, as he claims to be willing to do, and offers to assign or release upon its receipt. The answer also shows that the personal property left is depreciating in value and is worth less than the claim of defendant, and sets up the facts upon which a right to sell is based.

The case was heard upon motion to dissolve the injunction, when it was proved that the property had been uninsured for more than a year; but that after the advertisement for the sale, and just before the injunction was allowed, an insurance was effected, and the policy tendered to Schlieper; that the first note and a year's interest on the whole were overdue; that the property was already worth less than the debt, and was constantly depreciating; that Schlieper offered to transfer his security and assign the notes to the subsequent encumbrancer upon payment of the amount due,



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Copelin v. The Phoenix Ins. Co.

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which offer was declined; and that his security covers horses and some other property not embraced in the trust deed to plaintiff. It also appears that Barth, the trustee under the first deed, brought the surplus into court and was directed to pay it over to the clerk, who afterward was ordered to pay it to Schlieper.

Under the circumstances, it is clear that the subsequent mortgagee has no interest in preventing the sale. It is not disputed that the property is depreciating, and that it is already worth less than the debt due the defendant. The plaintiff abandons his proposition to redeem, and only asks to hinder the sale. He has no interest in this his ostensible object, but, on the other hand, his interest as mortgagee, if affected at all, would be promoted by a speedy sale before any further depreciation. His zeal in the premises against his own interest indicates that the mortgagor may be working under and through him to retain longer possession of the property. The court did right, then, after he refused to redeem, in dissolving the injunction and dismissing the petition, even without considering the right of the previous creditor to sell.

Its judgment should therefore be affirmed. The other judges concur.

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JOHN G. COPELIN, Respondent, v. THE PHOENIX INSURANCE  
COMPANY, Appellant.

1. *Insurance — Total loss — Abandonment, what facts authorize.* — When a vessel insured is stranded, the question whether the loss shall be deemed partial, or so far total as to warrant an abandonment, will depend upon the nature and extent of the peril in which the vessel is involved and the probable difficulty, hazard, and expense of attempting to deliver and repair her. When it appears that by proper exertions she might have been gotten off, and fully repaired at a moderate cost, the abandonment is void, and a partial loss only can be recovered; and to warrant the recovery of a total loss it must be proved that the delivery of the vessel from peril was, upon reasonable grounds, judged to be impracticable, or not to be effected unless at an expense that would absorb her value. The question is one of fact, and must be determined by the jury from the evidence before them.
2. *Insurance — Abandonment — Repairs — Reasonable time.* — After a vessel is abandoned by her owner and taken in custody by the insurer, unless her repairs are made within a reasonable time the insurer forfeits his right to return her, and must be considered as having accepted the abandonment.

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Copelin v. The Phoenix Ins. Co.

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*Appeal from St. Louis Circuit Court.*

*Moss & Sherzer*, and *Lackland*, *Martin & Lackland*, for appellant, cited among others the following authorities: *Hall v. Franklin Ins. Co.*, 9 Pick. 466; *Small v. U. S. Ins. Co.*, 11 Pick. 90; *Peel v. Suffolk Ins. Co.*, 7 Pick. 257; *King v. Hartford Ins. Co.*, 1 Conn. 42; *Marine Dock & Mut. Ins. Co. v. Goodman*, 4 Am. Law Reg. 481; 2 Pars. on Mar. Ins. 142, note; *Reynolds v. Ocean Ins. Co.*, 22 Pick. 198; *Peel v. Merchants' Ins. Co.*, 3 Mason, 42-78; *Wood v. Lincoln & K. Ins. Co.*, 6 Mass. 479-85.

*Glover & Shepley*, and *Rankin*, for respondent, cited *Peel v. Suffolk Ins. Co.*, 7 Pick. 254; *Reynolds v. Ocean Ins. Co.*, 1 Metc. 160; *Peel v. Merchants' Ins. Co.*, 3 Mason, 27; *Norton v. Lexington Fire Ins. Co.*, 16 Ill. 235; *Reynolds v. Ocean Ins. Co.*, 22 Pick. 191; *Copelin v. Phoenix Ins. Co. of N. Y.*, recently decided in U. S. Supreme Court; 2 B. Monr. 47; 10 Cush. 37; 2 Pet. 8, 10, 25.

WAGNER, Judge, delivered the opinion of the court.

This was an action brought upon a policy of insurance against the underwriters in favor of the plaintiffs, by which the steamboat *Benton* was insured for \$5,000 for one year, commencing on the 26th day of March, 1865. The policy is in the usual form of marine insurance. The evidence in the case tends to show that on the morning of the 3d day of November, 1865, while the *Benton* was descending the Missouri river, a number of miles above Omaha, she was driven by a heavy wind upon a large snag with such violence that the snag went through her hull, making a large hole, from which she soon filled with water, and that she was run upon a bar as far as possible; that her officers immediately erected pumps and bulkheads, and commenced pumping, and used their best efforts to raise her, and that they worked for several days without success; that all the time the water was washing out from under midships and her bow; that her bow was settling down. She was in a bad condition, being twisted, and

in danger of breaking in two. While in this condition the officers concluded that they could only save her machinery, and that all the balance would be a total loss. These facts they telegraphed to the plaintiff, at St. Louis, and received instructions from him, and they say from the defendant also, to proceed to wreck her as the only means of saving anything. The weather at that time was cold, and the river about closing with ice. It appears that on the 21st day of November the defendant took possession of the boat or wreck for the purpose of raising or repairing her, and restoring her to the plaintiff; that on that day, as plaintiff considered her a total loss, he made a formal written abandonment of her to defendant; that on the 27th day of November defendant succeeded in raising the hull, as the river had fallen very much in the meantime. Defendant started with her for St. Louis on the 20th day of March, 1866, being prevented from going earlier, as is alleged, on account of the ice, and she arrived at that port on the 12th of April thereafter. She was then put upon the docks to be repaired, and on the 9th day of May, 1866, she was tendered to the plaintiff, six months after the loss, and two months after the expiration of the policy. The actual repairs cost \$1,764.76, and the expense of raising her was 12,132.82; and she was worth, when tendered to the plaintiff, \$12,000 only. Her valuation in the policy was \$45,000.

There was further evidence going to show that defendant did not use proper diligence in making the repairs, and that all the repairs that were done could have been done within four days after the boat reached St. Louis; that the defendant did not repair the injury done by the sinking, and that it well knew this; that, in fact, it would have cost from \$5,000 to \$6,000 additional to have repaired the boat and put her in substantially as good condition as she was when she struck the snag, and that she was not properly repaired or tendered within a reasonable time. The case was tried before the court, and upon certain declarations of law the verdict was for plaintiff.

Without particularly or in detail noticing the instructions given for the respondent, we will simply state the law as we understand it in regard to the question of abandonment.

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Copelin v. The Phoenix Ins. Co.

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In *Norton v. Lexington Fire, Life & Marine Ins. Co.*, 16 Ill. 285, the court, after a very free discussion of the subject, say that the right to abandon must be determined by the judgment of experts, applied to the condition of the vessel at the time of abandonment; and although the cost of saving and repairing the vessel after her abandonment may be less than fifty per cent., yet if, at the time, the facts apparently justified an abandonment, it will be good.

In *Ruckman v. Merchants' Louisville Ins. Co.*, 5 Duer, 36, Duer, J., a very high authority on the law of insurance, declares in the opinion that "the true principle upon which the whole doctrine of abandonment may be said to rest, and by which alone its application, in converting a partial into a total loss, can be justified, is that which in the leading case of *Anderson v. Wallis*, 2 M. & S. 240, is stated by Lord Ellenborough with his accustomed brevity and force. It is, that an abandonment is never to be authorized except when, at the time, the loss was actually total, or in the highest degree probable; and if we analyze the cases that have settled the law as it now prevails in England, we shall find that it is this principle that runs through, explains and justifies them all. To select an example from each class of cases: When the vessel insured is captured, there is an actual total loss; but, as she may be recaptured or restored, an abandonment is necessary to warrant its recovery; a title must be vested in the insurers to give them the benefit of the *spes recuperandi*. But when the vessel is stranded, the question whether the loss shall be deemed partial, or so far total as to warrant an abandonment, will depend upon the nature and extent of the peril in which the vessel is involved, and the probable difficulty, hazard, and expense of attempting to deliver and repair her. When it appears that by proper exertions she might have been gotten off, and fully repaired at a moderate cost, the abandonment is void, and a partial loss only can be recovered; and to warrant the recovery of a total loss it must be proved that the delivery of the vessel from peril was, upon reasonable grounds, judged to be impracticable, or not to be effected unless at an expense that would absorb all her value. In

other words, it must be proved that a loss actually total was in the highest degree probable." (Fontaine v. Phoenix Ins. Co., 11 Johns. 295; The Sarah Ann, 2 Sumn. 255.)

The learned judge then continues to notice the fact that in the United States we have departed widely from the sound doctrine of abandonment, by extending to the vessel that moiety rule which, in its original application, was confined to the goods, and which, thus confined, had itself no other foundation than the existing probability of the eventual total loss.

Judge Story distinctly announces the rule that in case of stranding, the course that an owner uninsured, in the exercise of his best judgment, would have followed, furnishes the correct test of the right of the assured to abandon. (The Sarah Ann, 2 Sumn. *supra*.)

Chancellor Walworth, in the case of The American Ins. Co. v. Ogden, 20 Wend. 302, holds the same doctrine; and there would seem to be no reason why the same test might not, with equal justice, be applied to every case in which an absolute right to abandon is not established by conclusive proof that the cost of repairs would have exceeded half the value.

The matter resolves itself into a question of fact, and must be determined by the jury from the evidence before them. By the application of these principles we can not say that there was sufficient error in the first of the instructions given to justify a reversal. Although they are subject to some verbal criticism, yet they are substantially correct.

But the greatest objection is made to the instructions given by the court, which in effect declared that if the defendant, on or about the 21st day of November, 1865, took possession of said boat with a view of raising and repairing her, and retained her till the 9th day of May, 1866, before offering to return her to the plaintiff, and if she never was repaired as required by the terms of the policy, and if the defendant and its agents knew that she was not so repaired, and it would have required a large additional sum of money to have been expended upon her to have put her in such repair, and if the written notice of abandonment given by plaintiff was served on the defendant on the 22d day of November, 1865, then the plaintiff was entitled to recover.



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Copelin v. The Phoenix Ins. Co.

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Another instruction in substance told the jury that if the repairs could have been reasonably made in a much shorter time, and if the boat was not repaired and tendered in a reasonable time, then the verdict should be for the plaintiff.

It seems to be well settled that the owners of a vessel are not bound to receive her from the underwriters if there is any material deficiency in her repairs. She must be made as good as she was before.

As to the return of the vessel within a reasonable time, the cases lay down a uniform rule. I have seen but one authority denying the proposition, and that is an adjudication of an inferior court.

In *Norton et al. v. Lexington Fire, Life & Marine Ins. Co.*, *supra*, it is held that if, after an abandonment, the underwriter takes possession of the vessel, although he does it under protest, and gets her off and repairs her, no matter at how small or great a cost, it is an acceptance of the abandonment if he does not return her in a reasonable time. This principle is first announced in *Peel v. Suffolk Ins. Co.*, 7 Pick. 254, where it was explicitly adjudged that, unless the repairs are made within a reasonable time, the insurer forfeits his right to return the vessel, and he must be considered as having accepted the abandonment. In this last case the reason for the rule is thus stated by Parker, C. J.: "But the underwriter has his duties as well as his rights. If he took the vessel into his possession to repair her, he must do it as expeditiously as possible, in order that the voyage, if it be not completed, may not be destroyed. If he delay the repairs beyond a reasonable time, he forfeits his right to return the ship, and must be considered as taking her to himself under the offer to abandon. This principle can not well be contested. Without it, the underwriters may keep the assured entirely uncertain in regard to his rights and interests, and put his property in jeopardy. The right of the insurer to take into his custody the vessel of the assured without his consent, except under the abandonment, can not exist without the correlative duty to keep her as short a time as possible under the circumstances in which she may be placed."

The same principle is again affirmed in *Reynolds v. Ocean Ins. Co.*, 1 Metc. 160, and in the case between the same parties in

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Pennington v. Meeks.

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22 Pick. 191. We are also informed by the counsel for the respondent that the principle has recently been examined and approved in the Supreme Court of the United States, but the decision has not been published, and we have not yet seen it.

The only case we have seen that controverts the above authorities is *The Marine Dock & Mut. Ins. Co. v. Goodman*, decided in the Mobile Court of Chancery, and published in 4 Am. Law Reg. 481. This case is not sufficient to overcome the great weight of authority arrayed against it, and its reasoning does not commend itself to our approbation. We see nothing objectionable in the action of the court in the matter of giving and refusing instructions on behalf of the appellant.

Our conclusion is that the judgment should be affirmed. The other judges concur.

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N. J. PENNINGTON, Respondent, v. THOMAS J. MEEKS, Appellant.

1. *Practice, civil—Actions—Slander—When material words charged are the same, other and immaterial words may differ.*—In an action for slander, if the words charged imputed to plaintiff the same indictable offense, the petition would not be held bad because immaterial words were slightly modified so as to meet the proof under the different shapes in which it might come.
2. *Practice, civil—Actions—Slander—Different sets of words may be embraced in same count.*—In an action for slander, different sets of words spoken on different occasions may be set forth in the same count and be included in the same cause of action.
3. *Practice, civil—Actions—Slander—All the words charged need not be proved.*—In an action for slander, all the words charged need not be proved, either substantially or at all. It is sufficient to prove the identical words which of themselves constitute the slanderous imputation.
4. *Practice, civil—Actions—Malice in law, definition of.*—Malice in law embraces an act wrongfully and intentionally done, without just cause or excuse, and does not necessarily imply malevolence of disposition or enmity toward any particular individual.
5. *Practice, civil—Actions—Slander—Words held to be malicious in law, when.*—In an action of slander, words charging plaintiff with the crime of larceny were held to be malicious and slanderous of themselves, without regard to the question of intent; and if spoken as charged in the petition, the inference of malice would be a conclusion of law, and not of fact.

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Pennington v. Meeks.

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*Appeal from Fourth District Court.*

*Blair, Cover & Harrington*, for appellant.

I. Plaintiff has united several causes of action in one and the same count. (84 Mo. 134; 36 Mo. 202; 39 Mo. 451.)

II. The words should be laid in the petition as uttered. (*Watson v. Musick*, 2 Mo. 29; 7 Mo. 324; 26 Mo. 153-61.)

III. While words actionable *per se* import malice, yet the presumption of malice is not conclusive. (2 Kern. 67-74.)

*Ellison & Ellison*, for respondent.

I. The appellant gains nothing by insisting that the words charged vary from those proven. They differed in the words "he stole," etc., and "*Pennington* stole," etc., both in the third person. (8 Johns. 75.)

II. The words charged implied malice, and the instruction was properly refused upon that subject. The answer set up nothing in mitigation of damages. The evidence showed no extenuating circumstances. (*Weaver v. Henrick*, 30 Mo. 502.)

III. "Different sets of words importing the same charge, laid as spoken at the same time, may be included in the same count." (1 Chit. Pl. 405, note 3; *Rathbun v. Emigh*, 6 Wend. 407.)

CURRIER, Judge, delivered the opinion of the court.

This action was brought to recover damages for words alleged to have been spoken by the defendant, which imputed to plaintiff the commission of an immoral and indictable offense. The words charged are: "He (meaning the plaintiff) stole my hog, and I can prove it." The words are also charged in this form: "He (meaning the plaintiff) stole one of *our* hogs." The variation is immaterial. The material words are not only of the same signification, but are identical in both forms of expression. The other immaterial words are slightly modified so as to meet the proof under the different shapes in which it might come. In either form the words alleged impute to the plaintiff the crime of larceny, and that embraces the point and substance of the slander set out in the petition.

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Pennington v. Meeks.

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It is averred in the petition that the defendant, during the spring and summer of 1855, at different times and on different occasions, spoke the words in question of and concerning the plaintiff. It is thence inferred by the defendant's counsel that the petition contains different counts, stating different and independent causes of action. A motion in arrest is based on that theory. It is not well founded. The petition contains but one count, and states but one cause of action, and has but one conclusion claiming damages. The general features of the petition bear a close resemblance to the petition in *Birch v. Benton*, 26 Mo. 153, which sets out four different sets of words, and alleges them to have been spoken at different times and places. There was, however, but one conclusion of damages, and this court, per Richardson, Judge, declared the petition to contain but one count and one cause of action, although the court below had treated it as containing four counts.

Again, it is objected that different causes of action are mingled in the same count. What has been said substantially disposes of this objection. Different sets of words may be set forth in the same count, as was done in *Birch v. Benton*; and see *Starkie on Slander*, 442, Am. ed. 1858; *Rathbun v. Emigh*, 6 Wend. 407; *Williams v. Harrison*, 3 Mo. 290.

It is further objected that the slanderous words proved are different from those laid in the petition. There is no foundation for this complaint. The material words proved are identical with those alleged. One witness testified that the words were, "Don't you think Jim Pennington (plaintiff), the damned old rascal, stole one of our hogs?" Another witness put the words thus: "'Have you heard about Pennington stealing one of my hogs?' or 'our hogs?'" \* \* \* Meeks said, 'It is so; he had stole my hog,' or 'our hog.'"

Objections are also made to the action of the court in giving and refusing instructions. The instructions given were as favorable to the defendant as he had any right to demand, and put the issues of fact fairly to the jury. The material words charged were not only "substantially" proved, but literally. All the words charged need not be proved, either substantially or at all.

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Pennington v. Meeks.

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It is sufficient to prove the identical words which of themselves constitute the slanderous imputation. (Creelman v. Marks, 7 Blackf. 281; Iseley v. Lovejoy, 8 *id.* 462.)

"In a conversation in which a person is slandered," says Judge Richardson in *Birch v. Benton*, "a great deal may be said which does not vary the meaning of the offensive words, and therefore a variation between the declaration and proof as to the part of a statement which does not affect the sense will be immaterial; but the words which contain the poison to the character and impute the crime must be proved as laid; and this seems to be what is meant by the cases where they say that the words proved must substantially correspond with those charged."

The court declined to instruct the jury that their verdict should be for the defendant in case they found from the evidence, as a matter of fact, that the words in question "were not spoken in malice," and this refusal of the court is complained of as erroneous. This objection seems to be founded upon a misconception of the legal meaning of the term "malice." In common parlance malice means ill-will against a person, but the law attaches a different meaning. In its legal sense the term implies an act wrongfully and intentionally done, without just cause or excuse, and does not necessarily imply malevolence of disposition or enmity toward any particular individual. It imports the existence of an intention from which flows any unlawful and injurious act committed without legal justification. The books give these examples of legal malice: "If I give a perfect stranger a blow likely to produce death, I do it intentionally and without just cause or excuse." So, if I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, the law considers it as done of malice, because it is done wrongfully and intentionally. (See *Head on Libel and Slander*, § 82, note 1, and the authorities there cited.)

The words laid in the plaintiff's petition were malicious and slanderous of themselves. If they were spoken as charged, the inference of malice is a conclusion of law, and not of fact. (*Head, ubi supra.*) The instruction was properly refused.



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Brashears v. Strock et al.

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The jury was properly instructed in regard to the circumstances which were supposed to go in mitigation of damages, and the judgment will be affirmed. The other judges concur.

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R. M. BRASHEARS, Respondent, v. M. F. STROCK *et al.*,  
Appellants.

1. *Practice, civil—Appeal from justice's court—Cause of action—Statement of, can not be amended, when.*—Section 19, chapter 185, page 850, Wagn. Stat., providing that the same cause of action which was tried before a justice shall be tried on appeal to the Circuit Court, does not forbid a change in the statement of the cause of action itself, or an amendment of a loose and uncertain statement, provided the cause of action is not changed. But in a suit not founded on an account or instrument of writing, a paper filed with the justice in the following words, to-wit: "A., debtor to B., to \$50," wholly fails to be a "statement of facts constituting a cause of action" as required by that section; it can not be amended in the Circuit Court, and the case should be dismissed on motion.

*Appeal from Fourth District Court.*

*Harrington, Cover & Greenwood*, for appellants.

I. The account filed before the justice was insufficient, and gave the court no jurisdiction. (Gen. Stat. 1865, p. 701, §§ 12, 13; Casey v. Clark, 2 Mo. 12; Odle v. Clark, *id.* 13; Wathen v. Farr, 8 Mo. 324.)

II. The Circuit Court had no authority to allow the plaintiff to file a new statement and cause of action on appeal, but must try the same cause of action that was tried before the justice, and no other. The cause of action can not be changed. (Gen. Stat. 1865, p. 724, § 18; Webb v. Tweedie, 30 Mo. 488; Clark v. Smith, 39 Mo. 498; Hansberger v. Pacific R.R. Co., 43 Mo. 196.)

III. The case is within the sixth section of the statute of frauds. (Gen. Stat. 1865, p. 338, § 6; Brown on Frauds, §§ 300-8; 3 Pars. on Cont. 52-4; Gardner v. Joy, 9 Metc. 177.)

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 Brashears v. Strock et al.
 

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*Ellison & Ellison*, for respondent.

The case in 8 Mo. 324 is not in point for appellants. In that case the cause of action on file was not supported by the proof. The court say, in express terms, that all form is dispensed with, and the party can require a verbal statement before the trial opens. (8 Mo. 324; 25 Mo. 433.) If it was patent upon the papers that the cause of action was changed by the amendment, then their motion should have been sustained. But such is not the case. If there was no cause of action before the justice, why did they not move to dismiss? They appealed to some cause, and does it appear from the records that that cause was changed by the amendment? (20 Mo. 568.) All the cases cited by appellants upon this point show upon the record that the cause of action was changed. "An account filed is a sufficient statement of a cause of action before a justice of the peace." (Phillips' Assignee v. Fitzpatrick *et al.*, 34 Mo. 276.) The parties were not surprised by the amendment.

BLISS, Judge, delivered the opinion of the court.

The plaintiff brought suit against defendants before a justice of the peace, and filed the following statement :

"M. F. STROCK, A. SEIBERT, H. GARLOCK, JESSE HALL, JOHN G. KELLY,  
 "To RICHARD BRASHEARS.....\$50.  
 To fifty dollars."

Upon the trial he verbally charged them with violating a contract to take a kiln of brick he was to burn for them, and obtained a judgment for \$50, from which defendants appealed. In the Circuit Court the plaintiff, on leave, amended his statement to read as follows :

"HIRAM STROCK, JOHN KELLY, HARRY GARLOCK, JESSE HALL, and  
 AARON SEIBERT,

In account with RICHARD M. BRASHEARS, Dr.

"To damages in failing to comply with agreement to take a kiln of brick which they engaged said Brashears to make.....\$50."

This change in the account was duly excepted to, and the statute of frauds was also interposed, the defendants claiming that the contract was a verbal one, and not to be performed within

a year. But the plaintiff again obtained judgment, which was affirmed in the District Court, and defendants bring the case here. They first claim that the change in the statement of the claim was a change in the cause of action, which the statute (Wagn. Stat., ch. 185, p. 850, § 19) forbids. The following is the section: "The same cause of action, and no other, that was tried before the justice, shall be tried before the appellate court upon the appeal." This does not forbid a change in the statement of the same cause of action, but only a change in the cause of action itself, and it is not pretended that in this case a different cause was prosecuted in the Circuit Court from what had been tried before the justice. So, then, there was no violation of this statute.

But the original paper filed with the justice was about as near no statement as could well be made. It gives the names of the parties and the amount claimed, but wholly fails to be a "statement of facts constituting the cause of action," as is expressly required when the suit is not founded on account or instrument of writing. (See Wagn. Stat., ch. 178, p. 814, § 13.) This court has been very liberal toward proceedings before justices of the peace, and very slight indications of the facts constituting the cause of action should be held to be sufficient. But there should be something to advise the opposite party what he is sued for, and in this instance there is nothing at all.

The defect was not waived in the Circuit Court, for the first step taken by the defendants was to move to dismiss for want of a statement before the justice; hence they saved the point. We find no fault with the amendment in the Circuit Court, had there been anything to amend; for a loose and uncertain statement may well be made more certain and definite, if there is no change in the cause of action. There is nothing in the second objection, as, according to testimony, the brick were to be made within a year.

The judgment is reversed and the cause dismissed. The other judges concur.

STATE OF MISSOURI, Defendant in Error, v. MAX KLINGER,  
Plaintiff in Error.

1. *Practice, criminal—Jury—Panel, incomplete—Not ground of reversal, when.*—The Supreme Court will not reverse a conviction for murder on the ground that the panel of jurors was not full, where the trial progressed without any objection, and it was not shown that defendant was deprived of the privilege of making the full number of statutory challenges, or that he suffered the least prejudice from the course pursued.
2. *Practice, criminal—Jury—Demand of list of jurors a privilege, and which may be waived.*—In criminal prosecutions, the delivery of a list of jurors to the prisoner forty-eight hours before trial, under section 8, p. 1102, Wagner's Statutes, is a privilege extended to the accused for his benefit, and if he does not make the demand or require the list he is presumed to have waived it.
3. *Practice, criminal—Sanity—Evidence—Testimony of experts, when improper.*—In a murder trial, counsel for defendant put to a medical expert the following question: "When the defendant has been undeniably subject to fits of epilepsy, should he not have the benefit of every reasonable doubt that might arise as to his sanity?" *Held*, that the question was properly ruled out, as it substituted the witness in the place of the court and jury, and made him the judge of the weight and effect of evidence.
4. *Practice, criminal—Evidence—Medical experts, facts being disputed, can only testify on hypothetical facts—Witnesses not experts can not give an opinion from evidence in a cause.*—A medical expert, who has been present during a trial and heard all the evidence, there being no dispute about the facts, may be asked his opinion about the whole matter; but when the facts are disputed, this course of interrogation is inadmissible, and the question should be stated hypothetically. And witnesses not experts may give their opinion, accompanied by the facts existing within their knowledge and observation, but they can not be permitted to give an opinion upon the question whether a hypothetical state of facts would or would not, if true, be evidence of insanity, nor from mere evidence which they have heard other witnesses detail.
5. *Statute, construction of—Insanity—Restraint after acquittal, on ground of.*—The statute restraining prisoners who are acquitted on the ground of insanity, has reference solely to insanity existing at the time of the trial, and then it is a question exclusively for the determination of the court, with which neither the jury nor counsel have anything to do.
6. *Practice, criminal—Counsel should not be permitted to read law to the jury, when.*—Whether counsel will be allowed to read books to the jury, is a matter resting within the discretion of the court; but a court ought never to permit an attorney to read the law to a jury when the inevitable effect would be to mislead.

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State of Missouri v. Klinger.

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*Error to St. Louis Criminal Court.*

*W. H. H. Russell*, for plaintiff in error, urged among others the following points:

I. If the defendant was entitled to a panel of forty qualified jurors, he could not waive that right. (*Basie v. Ambrose*, 28 Mo. 46; *State v. Mansfield*, 51 Mo. 475; 1 Chit. 401; 11 Ga. 337; 3 Chit. Pr. 50, 51.)

II. It was the duty of the marshal to summon forty qualified and competent jurors, and furnish defendant with a list of their names forty-eight hours before trial.

III. The following question was asked: "When the defendant has been undeniably subject to fits of epilepsy, should he not have the benefit of every reasonable doubt that might arise as to his sanity?" Was this question proper? (See *Ray's Juris.*, §§ 436, 437; *Wharton & Stille*, §§ 142, 149.) The opinion of medical experts, and of laymen who are familiar with the facts in the case, upon the question of sanity or insanity of the prisoner, were admissible as evidence in the case at bar. (*Elwell on Malpractice and Med. Ev.* 275, 294; *Ray*, 607; and see also *Doe v. Ryan*, 5 Black, Ind., 217; *Gibson v. Gibson*, 9 Yerg. 329; 2 Ired., N. C., 78; *State v. Clark*, 12 Ohio, 483; *Lester v. Pittsford*, 7 Verm. 158; *Morse v. Crawford*, 19 Verm. 499; 3 Wash. C. C. 580.)

IV. The counsel for the defendant had the undoubted right to read the opinion of the Supreme Court upon the question of insanity, and the weight of certain evidence as to the issue in the case. It was not done to mislead the jury, and could not mislead them. There was no impropriety in the counsel's reading the provisions of the statute touching the custody of insane persons under criminal sentence. (*Gen. Stat.* 1865, pp. 311, 343, 345.)

*Chas. P. Johnson*, Circuit Attorney, for defendant in error.

WAGNER, Judge, delivered the opinion of the court.

The defendant was indicted in the St. Louis Criminal Court for the killing of one Henry Wider. Upon trial he was found



guilty by the jury of murder in the first degree, and in accordance with the verdict he was sentenced to be hung.

There is no dispute about the commission of the crime, and if the defendant was sane and possessed of capacity which rendered him responsible at the time the act was perpetrated, there is nothing to extenuate it, and it was a most brutal and atrocious murder. The whole defense was based upon the insanity of the accused.

The case was here upon a previous conviction, and the judgment of the lower court was reversed for reasons given in the opinion (48 Mo. 127); and on a re-trial the law was laid down in conformity with the rulings of this court. Several irregularities are now complained of, and exceptions are also taken to the action of the court in excluding testimony. These we will proceed to notice in their order.

It is insisted, as one ground of error, that a full panel of jurors was not summoned, and that a list of the same was not furnished to the defendant forty-eight hours before the trial, as provided by the statute. This objection was not noticed or urged upon the trial, and it was only brought to the attention of the court in a motion for a new trial. The record shows that twelve good and lawful men were duly elected, tried, and sworn to try the cause, and it seems they were mutually satisfactory to both parties.

The statute enacts that the defendant in every indictment for a criminal offense shall be entitled to a peremptory challenge of jurors as follows: "First, if the offense charged is punishable with death, or by imprisonment in penitentiary not less than for life, to the number of twenty, and no more. Second, if the offense be punishable by like imprisonment not less than a specified number of years, and no limit to the duration of such imprisonment is declared, to the number of twelve, and no more." (2 Wagn. Stat. 1102, § 4.) In capital cases the State is entitled to eight peremptory challenges, and a full panel thereof would consist of forty jurors, and it is said that there were not that number. But the trial progressed without any objection, and it is not shown that the defendant was deprived of

the privilege of making the full number of statutory challenges; and it nowhere appears that he suffered the least prejudice from the course that was pursued. And when such is the case this court will not reverse. (State v. Hays, 23 Mo. 287.)

As to the point that the list was not delivered to the prisoner forty-eight hours before the trial, we see no error in the ruling of the court in refusing the motion on that ground. The delivery of the list is an absolute and positive requirement only when the prisoner demands it.

The eighth section of the chapter in the statute above referred to provides that a list of the jurors summoned shall be delivered to the defendant in the cases specified in the first two subdivisions of the fourth section at least forty-eight hours before the trial, and in other cases before a jury is sworn, if such list be required. It is simply a privilege which the statute extends to the accused for his benefit, and if he does not make the demand or require the list he is presumed to have waived it.

In the course of the examination of one of the medical witnesses as an expert, the counsel for the defense asked this question: "When the defendant has been undeniably subject to fits of epilepsy, should he not have the benefit of every reasonable doubt that might arise as to his sanity?" This question was objected to and the objection sustained, and an exception was taken to the ruling of the court.

The action of the court was so obviously correct and proper that it requires no process of reasoning to justify it. The question proposed substituted the witness in place of the court and jury, and made him the judge of the weight and effect of the evidence.

The defense then called two witnesses, J. H. Conn and Groshon. It seems that Conn was foreman of the jury when the defendant was previously tried, and he was asked his opinion as to the sanity of the defendant at the time of the homicide. The witness was not called as an expert, and the attorney for the defense stated that he desired to prove by him his opinion based upon the facts in the case and the witness's knowledge of the defendant. It is not shown that the witness knew anything

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State of Missouri v. Klinger.

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in regard to the condition of the defendant, except as he learned it from his connection with the previous trial. The testimony was ruled out.

Substantially the same question was put to Groshon, who was on the grand jury after the indictment was found, and who stated that the grand jury visited the jail and called the defendant out of his cell, and that he asked him some questions and felt of his head; and that, as he took some interest in him, he went back afterward to see him. This was all the knowledge that he had of the defendant. The court also refused to permit him to answer the question.

Medical men, who are scientific and possessed of professional skill, are allowed to testify as experts, and give their opinion as to the sanity or insanity of a prisoner. So those who are not professional men are permitted to testify and give their opinion under certain circumstances. But the manner of conducting the examination, and the facts whence the witnesses draw their inferences or conclusions, are essentially different. The medical expert gives to the jury the result of his professional skill, science, and learning. His opinions are brought to their assistance, but they are not conclusive upon the jury, and they may give them such weight as they deem they are entitled to, and no more.

If the expert has been present in court, and has heard all the evidence, and there is no dispute about the facts, he may then be asked his opinion about the whole matter. But when the facts are disputed, this course of interrogation is inadmissible, and the question should be stated hypothetically. In *The State v. Windsor*, 5 Harring. 512, and *Conn v. Rogers*, 7 Metc. 500, the following was held to be a proper form of question to be put to an expert: "You have heard all the evidence in this case; supposing the jury to be satisfied that the facts and circumstances testified to by the other witnesses are true, what is your opinion, as a medical man, of the state of the prisoner's mind at the time of the commission of the alleged crimes? Was the prisoner, in your opinion, at the time of doing the act, under any and what kind of insanity or delusion, and what would you expect would be the conduct of a person under such circumstances?"

Witnesses who are not experts may be permitted to state whether they deem the prisoner to be insane, but it can only be done in connection with their statements of the particular conduct and expressions which form the basis of their judgment. They may give their opinion, accompanied with the facts existing within their own knowledge and observation, but they can not be permitted to give an opinion upon the question whether a hypothetical set of facts would or would not, if true, be evidence of insanity, nor from mere evidence which they have heard other witnesses detail. The two witnesses whose evidence was rejected were not experts, nor did they possess the requisite knowledge to enable them to give an opinion.

The remaining objections relate to the action of the court in refusing to let the counsel read to the jury certain sections of the statute and a former decision of this court, and proceed to comment on them to the jury. Whilst the counsel for the defense was summing up, he referred to sections 43 and 45 of the chapter in the statute in reference to the lunatic asylum, and went on to say to the jury that if they entertained a reasonable doubt as to the sanity of the defendant at the moment of the homicide, they should give him the benefit of the doubt, and that the law had provided a way by which he might be disposed of, as it would be the duty of the court to issue an order restraining him in custody until he could be sent to the insane asylum. The court interrupted the counsel, and stated that that was a question for the consideration of the court alone, after verdict; that if the defendant were acquitted on the ground of insanity at the time of the commission of the alleged homicide, the court would not make an order to send him to the insane asylum unless satisfied that at the time of the acquittal he was insane; that the court would never make an order to send a sane man to the asylum.

The court, we think, was fully justified in the course it pursued. The conduct of the counsel was unwarranted, and outside of any issue presented in the case.

The statute restraining prisoners who are acquitted on the ground of insanity has reference solely to insanity existing at the time of the trial, and then it is a question exclusively for



the determination of the court, with which neither the jury nor counsel have anything to do.

There was no pretense set up at any time that the defendant was insane when he was arraigned and tried, and the court committed no error, after what had transpired, in stating that it would not send a sane man to the asylum.

The counsel then commenced reading the decision of this court in the case when it was here on a former occasion, for the avowed purpose of showing what opinion this court entertained as to the question of defendant's insanity and the weight of the evidence. In this he was stopped by the judge of the Criminal Court, and not permitted to proceed. When the case was here before, this court gave no opinion in regard to the insanity of the defendant, nor did it venture to intimate anything in relation to the weight of evidence. It only declared that, should the depositions prove what he contended they would, they would have a tendency toward maintaining the issue presented by the defense. Whether counsel will be allowed to read books to the jury is a matter resting within the discretion of the court, but it is very certain that a court ought never to permit an attorney to read the law to a jury from a book when the inevitable effect will be to mislead.

We have now examined every objection which has been raised against the judgment of the court below. They are all trivial, unsubstantial, and without foundation. I have never perused a record where such evident lenity was exhibited toward the accused. The court and the attorney prosecuting for the State allowed him every latitude and indulgence, and he had the benefit of everything that would conduce to his acquittal. His only defense was insanity, and the jury have found that no insanity existed. They could not have found otherwise unless they had disregarded the facts in the case and been governed by that sickly, maudlin sentimentality which of late has become fashionable, and which would grant an immunity to every gigantic criminal on the assumed ground of insanity. The defendant has no reason for complaint; he had a fair trial; his guilt was clear and his conviction just.

Let the judgment be affirmed. The other judges concur.



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State ex rel. White, relator, v. Clay County.

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STATE *ex rel.* C. J. WHITE, Relator, v. CLAY COUNTY,  
Respondent.

1. *Mandamus*—Act of November 5, 1857, bonds issued under—Warrants, county—*Mandamus* to enforce payment of by taxes.—Certain warrants issued by the County Court of Clay county were in the following form:

“Treasurer of County of Clay:

“Pay to the Farmers’ Bank of Missouri one hundred dollars, out of any money in the treasury appropriated for county expenses, with eight per cent. interest from 15th of April, 1861.

“Given at the court-house this 7th day of May, 1861.

“By order of the County Court.

“Test: E. D. MURRAY, Clerk.

THOMAS M. CHEVIS, President.”

In *mandamus* by the holder of said warrants against Clay county, based on the act of November 5, 1857 (Adj. Sess. Acts 1857, p. 276), to compel its County Court to assess a tax for the purpose of raising money to pay them, *held*, that the warrants had none of the *indicia* of bonds authorized by the act—not being issued in the name of the county, or under the seal of the court, and not containing on their face a statement of the time, terms, and amount of the loan—and that the application for *mandamus* must fail.

2. *Mandamus* does not lie to enforce collection of ordinary county indebtedness, prior to judgment obtained thereon.—A relator is not entitled to peremptory *mandamus* to enforce the collection of an ordinary county indebtedness, prior to that indebtedness being reduced to judgment.

*Petition for mandamus.*

W. B. Napton, Jr., for relator.

I. It matters not, as far as the relator is concerned, whether the court borrowed money in form or not by issuing bonds therefor. Issuing warrants bearing ten per cent. interest to the contractors answered the purpose of the law, and essentially fulfilled the requirements of the act of the Legislature; and a departure on the part of the County Court, such as is disclosed in this case, can not affect the rights of the relator or the liability of the county. (See *City of Bridgeport v. Housatonic R.R. Co.*, 15 Conn. 475; *Slack v. Maysville & Lexington R.R.*, 13 B. Monr. 9; *Maddox v. Graham & Knox*, 2 Metc., Ky., 56; *The People v. Mead*, 24 N. Y. 114; *State ex rel. Moran Bros. v. Commissioners of Clinton County*, 6 Ohio St. 280; the last case is particularly referred to.)

State ex rel. White, relator, v. Clay County.

II. In this case no injury could possibly result to the county by the court not issuing bonds and borrowing money in that manner, but, instead, issuing non-negotiable warrants bearing a less rate of interest by two and a half per cent. than the court was authorized to pay for a loan.

III. The relator stands in the place of an innocent *bona fide* purchaser for value of these warrants, and the county is estopped from asserting that they were illegally issued. (Hann. & St. Jo. R.R. v. Marion County, 36 Mo. 234.)

McCarty & Bining, and H. B. Johnson, for respondent.

I. The relator seeks, by *mandamus*, to compel the payment of unlawful and usurious interest. This writ can not be invoked in the assertion of an inequitable claim. (State v. Treasurer of Callaway County, 43 Mo. 228.)

II. Where the amount of a claim is not fixed by law, it must be reduced to a judgment in a court in which a trial by jury can be had, before the levying a tax to pay the same will be compelled by *mandamus*. (Bennet v. Auditor Portage County, 12 Ohio, 54; Putnam County v. Allen County, 1 Ohio, 322; *ex parte* Lynch, 2 Hill, 45; Boyce v. Russell, 2 Cow. 444; People v. Brooklyn, 1 Wend. 325; *ex parte* The Firemen's Ins. Co., 6 Hill, 243; People v. Chenango County, 11 N. Y. 573; 1 Tenn. 114; Moses on Mandamus, 107.)

III. Where a debt remains in its original form as a simple contract debt, not having been reduced to a judgment, the creditor has no legal right to *mandamus* to compel a municipal corporation to levy and collect a tax for its payment. (Coy v. City Council of Lyons City, 17 Iowa, 7.)

IV. A *mandamus* to levy a tax will not be granted where there has been no unreasonable delay. A County Court can not be charged with unreasonable delay where, for the purpose of paying county expenses and indebtedness, it has every year levied a tax upon the people of the county to the full extent allowed by law; and in such case the courts, in the use of their undoubted discretion, will refuse the writ. (Tilson v. Commissioners of Putnam County, 19 Ohio, 415.)

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State ex rel. White, relator, v. Clay County.

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CURRIER, Judge, delivered the opinion of the court.

This is a proceeding for a peremptory *mandamus* requiring the County Court of Clay county to assess a tax for the purpose of raising money to pay the claims set out in the petition. The petitioner states that he is the owner of one hundred and twenty-nine warrants issued by said county, for the sum of one hundred dollars each, dated May 7, 1861, and in the following form, to-wit:

"Treasurer of County of Clay: [ \$100.]

"Pay to the Farmers' Bank of Missouri (branch at Liberty) one hundred dollars, out of any money in the treasury appropriated for county expenses, with eight per cent. interest from 15th of April, 1861.

"Given at the court-house this 7th day of May, 1861.

"By order of the County Court.

"Test: E. D. MURRAY, Clerk. THOMAS M. CHEVIS, President."

It is alleged that these warrants were issued under the authority of the act of November 5, 1857 (Adj. Sess. Acts 1857, p. 276), and upon that ground the application for a peremptory *mandamus* is founded. The return controverts that allegation and takes issue upon it.

The case shows that the county of Clay initiated measures for the erection of a court-house some six months before the act of November, 1857, was passed, and that prior to the passage of that act the work had been contracted for, and some four thousand dollars in county warrants paid on account of it. The County Court continued to issue warrants of the same character, varying only as to interest, until the whole job was paid for and the building accounts settled.

It appears that the contractors in the meanwhile used the warrants to borrow money upon, pledging them as collateral security to the Farmers' Bank for that purpose. Subsequently the bank adjusted its loan account with the contractors, and accepted the warrants in payment and satisfaction of it. At a later date, and in May, 1861, the Clay County Court took up the warrants held by the bank, and substituted in place of them two hundred and forty-nine warrants of one hundred dollars each, the warrants described in the petition being a portion of them, the plaintiff

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State ex rel. White, relator, v. Clay County.

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having acquired them by purchase and assignment. It further appeared that a portion of the warrants first issued by the County Court, on account of the building contract, bore no interest, and that they were subsequently, and after the passage of the act of November, 1857, changed by interlineation so as to carry interest at the rate of ten per cent. The foregoing are the material facts upon which the decision of the case depends.

The act of 1857 authorized the County Court of Clay county to "borrow" the amount of money therein specified, "to be appropriated in erecting a court-house in said county," and to issue the "bonds" of the county for the money so borrowed. The act also authorized the court to levy a tax to meet the bonds so issued as they might mature. The bonds contemplated by the act were, by express requirement, to be issued "in the name of the county" and "under the seal of the court," and were to contain on the face of them a statement of the "time, terms, and amount of the loan."

It is perfectly apparent that the "warrants" set out in the petition contain none of the foregoing *indicia* of the "bonds" authorized by the statute. They are not bonds in any legal sense, but were simple contract obligations.

The term "bond" imports an obligation in writing under seal, and the special act itself expressly requires that the bonds therein authorized shall be issued "under the seal of the court." They were, therefore, as a condition of their issue, first to be verified and authenticated by the seal of a court of record. But the warrants were not sealed instruments in any sense whatever.

Counsel represent the court as saying, in *People v. Mead*, 24 N. Y. 114, "that when commissioners are directed to issue bonds under the official seal and signatures, the law is satisfied by instruments not under seal." That is a very strange perversion of the sentiments of the court. What the court in fact said, in that case, was this: "It is objected that the instruments are unauthorized because they are not specialties, and it is argued that the word 'bond' used in the act can only be satisfied by an instrument under seal. But the towns do not have and are not



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State ex rel. White, relator, v. Clay County.

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supposed to possess a common seal. There is no provision for the adoption of one, or for its custody. But if the town had a seal it would not have been proper to affix it to these obligations, for the act directs that they shall be executed in another manner, viz: under the official signatures of the supervisors and the railroad commissioners, and these instruments were authenticated in that manner. Whatever force there may be in the words 'bond or bonds,' which were used in the act, it is overcome by the explicit direction as to their execution, which has been mentioned."

The authority cited, instead of supporting the plaintiff's case, seems, on the contrary, to be quite fatal to it; for it directly recognizes, and that portion of the decision was founded upon the principle, that the requisitions of the act under which the instruments were supposed to have been issued must be complied with, although such compliance involves the disregard of the technical force and meaning of particular words.

The warrants described in the petition were not issued under the seal of the court, or indeed under any seal, and do not, therefore, meet the requirements of the act in that particular. They are mere ordinary non-negotiable county warrants, such as are contemplated by the general act in relation to county treasuries. (Gen. Stat. 1865, ch. 38, §§ 8, 9.) Their only peculiarity consists in the circumstance that they were drawn, having a specified rate of interest. Moreover, the case fails to show that the County Court ever undertook to borrow money under the special act, or indeed to borrow money at all. They did not borrow money wherewith to build the court-house, but ran the county in debt for the cost of its erection; and then, from time to time, as they were required, issued ordinary county warrants in settlement of such indebtedness, subsequently exchanging one set of county warrants for another set of the same general character. These warrants in no way purport to have been issued under the authority of the special act; nor is there a circumstance to indicate, or suggest even, that the special act was present to the thought of the court in connection with their issue, unless the insertion of a clause for interest is calculated to raise such suggestion. These warrants, therefore, not appearing to be the bonds contempla-



The State, to use of Coleman, v. Willi.

ted by the act aforesaid, and not appearing to have been issued under the authority or in accordance with the terms of that act, this application must fail; for it is not understood to be claimed that the relator is entitled to a peremptory *mandamus* to enforce the collection of an ordinary county indebtedness, prior to that indebtedness being reduced to judgment. (See *Coy v. City of Lyons*, 17 Iowa, 7.)

The peremptory writ will be denied. The other judges concur.

THE STATE, TO THE USE OF JOHN E. COLEMAN, Respondent, v.  
SAMUEL WILLI, Appellant.

1. *Limitations, statute of*—*Absence of plaintiff from the State*.—Absence of plaintiff from, or his non-residence in, the State, does not prevent the running of the statute of limitations.
2. *Limitations*—*Guardian and ward*—*When statute commences running*.—After the ward becomes of age, he stands in the relation of creditor to his guardian. His cause of action is then complete; and if he fails to bring suit within the time limited by statute thereafter, the claim is barred.

*Appeal from St. Louis Circuit Court.*

*Espy*, for appellant.

I. The action presents a claim against which the statute of limitations will run. (R. C. 1849, p. 74, § 1; R. C. 1855, p. 1047, § 1; Wagn. Stat. 917, § 8.)

II. At the date of the guardian's settlement of his account in Probate Court, the statute commenced to run against him. (Wagn. Stat. 917, § 8; *Johnson and Wife v. Smith's Adm'r*, 27 Mo. 591; *Rabsuhl v. Lack*, 35 Mo. 316.)

III. Absence from the State, or non-residence of the plaintiff in this State, does not prevent the running of the statute of limitations. (*Taylor's Adm'r v. Newby*, 13 Mo. 159.)

*Wickham*, for respondent.

The statute of limitations did not begin to run in favor of appellant until there was a present existing and subsisting cause

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The State, to use of Coleman, v. Willi.

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of action against him, and this did not accrue until there was a breach of condition of the bond, by reason of the conversion of the funds of respondent by the administrator of the guardian to use of his heirs, or by failure and refusal to pay over the same to respondent, whereby the default of the guardian and the breach of the bond became complete. (State v. Holt, 27 Mo. 342; Chambers, Adm'r, v. Smith, 23 Mo. 180.) Time begins to run against a trust only from the date of its disavowal; and until the refusal to execute it, or some other breach, the cause of action on it does not accrue. (Cunningham v. McKinley, 22 Ind. 149, 152.) The duties of Musick did not cease until he had fully accounted and paid over the balance in his hands to his ward, and until that time the surety was liable. (Gilbert v. Guptill, 34 Ill. 139; Burge on Sureties, 272; *id.* 113; State, etc., v. Drury, 36 Mo. 289; Brown v. Houdlette, 1 Fairf., Me., 399.)

BLISS, Judge, delivered the opinion of the court.

Defendant was surety upon the bond of William Musick, deceased, as guardian of Coleman, dated March 23, 1850. On the 9th of June, 1856, Coleman having just arrived at his majority, his guardian filed in the Probate Court a settlement showing a balance of \$440.78 due the ward, and soon after died. His administrator, one Ferguson, kept the fund separate in his account, and the ward Coleman not being heard from (having gone to California before his majority), distributed it to the heirs of Musick. Coleman returned in 1868, and commenced suit against defendant upon the original guardian's bond. The only defense is the statute of limitations. Absence of the plaintiff from the State, or non-residence, is not enumerated among the exceptions as barring the running of the statute. (Taylor's Adm'r v. Newby, 13 Mo. 159.)

In Johnson v. Smith's Adm'r, 27 Mo. 591, this court held that the statute began to run in favor of a guardian, in his own wrong, from the time the property of the minor came into his hands; and in The State v. Blackwell, 20 Mo. 97, that it began to run in favor of an administrator from the final settlement and the order

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The State, to use of Coleman, v. Willi.

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of distribution. So it will be seen that the fiduciary relation of an administrator and guardian is not treated as a continuing and subsisting trust after the time when, by the terms of its creation, it should terminate and the proceeds of the trust be accounted for.

The question has been directly passed upon in other States, where it is held that after the ward becomes of age he stands in the relation of a creditor to his guardian; and if he does not bring suit within the time limited by statute, the claim is barred. (Ball v. Tomson, 4 Watts & Serg. 557; Green v. Johnson, 3 Gill & Johns. 389.) In the latter case the court remarks: "As soon as a trust ceases to be a continuing, subsisting trust, or expires by its own limitation, or is put an end to by the act of the parties, if it be a fit subject for a suit at law, a cause of action arises, and the statute of limitations begins to run. The moment a ward is emancipated from the authority of his guardian by reaching the age prescribed by law, his cause of action is complete. The relation which existed between them ceases to be a subsisting trust; an action of account may be immediately instituted in a court of law, and from that time the act of limitation dates the commencement of its operation." (See also Alston v. Alston, 34 Ala. 29; Taylor v. Kilgore, 33 Ala. 221; Davis v. Ford, 7 Ohio, 104, as bearing upon the question.) As over twelve years had elapsed from the majority of the plaintiff before the commencement of the suit, his claim under the law was barred.

The judgment of the Circuit Court is reversed. The other judges concur.

Youngblood, Adm'r of Tuley, v. Vastine, Adm'r of Wright, et al.

JAMES M. YOUNGBLOOD, ADMINISTRATOR OF JOSEPH TULEY, Appellant, v. JOSEPH P. VASTINE, ADMINISTRATOR OF SARAH D. WRIGHT; D. ROBERT BARCLAY, TRUSTEE OF ANN A. MACDONALD *et al.*, Respondents.

1. *Conveyances* — *Recorded deed by heirs will give title as against unrecorded deed of deceased grantor.* — The heirs of a grantor in an unrecorded deed of land, on his death become the apparent owners of the legal title, and a duly recorded conveyance by them of the same estate to an innocent purchaser will carry the title as against the first grantee, in like manner as if made by the ancestor.

*Appeal from St. Louis Circuit Court.*

*Garesche*, for appellant.

The heirs had no other title than they inherited, and that was what the ancestor had when he died, which was nothing, because he had conveyed. (*Caldwell v. Head*, 17 Mo. 561; *McCamant v. Patterson*, 39 Mo. 110; *Hancock v. Beverly's Heirs*, 6 B. Monr. 532; *Hill v. Meeker*, 24 Conn. 214.)

*Ewing & Holliday*, for respondents.

The deed of trust not being recorded when the defendant Barclay purchased the property from the heirs of Mrs. Wright, four years after Mrs. Wright's death, and the deed from the heirs to Barclay having been recorded several months before said deed of trust, by our registry laws the deed to Barclay must prevail. (*Tucker v. Harris*, 13 Ga. 1, and cases cited; *McCulloch's Lessee v. Eudaly*, 3 Yerg. 346; *Powers v. McFarren*, 2 Serg. & R. 44; *Kennedy v. Northrup*, 15 Ill. 148; dissenting opinion in *Hill v. Meeker*, 24 Conn. 211; 15 Ill. 148; R. C. 1855, p. 364, § 42; Gen. Stat. 1865, p. 447, § 26.)

BLISS, Judge, delivered the opinion of the court.

Sarah G. Wright, deceased, by herself and her trustee, on the 20th day of July, 1859, executed to E. J. Xaupi, in trust, to secure the payment of a promissory note of same date for \$3700, given to Joseph Tuley, then living, a deed of certain real estate,



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Youngblood, Adm'r of Tuley, v. Vastine, Adm'r of Wright, et al.

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her separate property, situate on the corner of Pine and Eighth streets, in St. Louis, which deed was not put upon record until the 19th of October, 1866. The said Joseph Tuley and Sarah G. Wright died in 1860 and 1861, and on the first of October, 1865, D. Robert Barclay, as trustee for Mrs. Ann A. Macdonald, and with her funds, purchased said property of the heirs of said Sarah G. Wright, and received a warranty deed of the same, which was recorded April 28, 1866. It appears from the evidence that neither Barclay nor Mrs. Macdonald had any knowledge of the trust deed to Xaupi; that the records were examined before the purchase to see if there were any encumbrances upon the property; that a full consideration was paid for it; that the estate of Mrs. Wright had been settled by the public administrator, and that all debts presented had been paid, but this note was not among them.

This suit was brought by the administrator of Tuley to foreclose his trust deed, and the contest arises in consequence of the failure on the part of Xaupi, to whom it was made, to place it upon record. Had the second deed been executed by Mrs. Wright while living, there would be no question that it would hold against the unrecorded deed. But in some of the reported cases upon the subject it is held that the same preference can not be given to the second deed if made by the heirs of the first grantor. I confess I am not struck with the force of the reasoning upon which the distinction is made, for it is based upon the idea that the second deed is inoperative because nothing descended to the heirs, and hence they had nothing to convey. If that be so, it was because nothing was left in the ancestor that could descend; that his whole estate was divested by the first deed. If his whole estate was so divested, how could a second deed, if made by himself, be operative? Yet it is not disputed that such second deed would convey the estate, notwithstanding the first.

Yet the distinction is made by some of our most respectable courts, and it is apparently recognized by this court. In *Hill et al. v. Meeker*, 24 Conn. 211, the majority of the court held that the unrecorded deed from the ancestor so divested him of his title that his son and heir "took nothing by inheritance that he could



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Youngblood, Adm'r of Tuley, v. Vastine, Adm'r of Wright, et al.

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convey or mortgage to a *bona fide* purchaser who had no knowledge of the deeds." The case is a much harder one than the one at bar, and the decision is based upon "a clear distinction between a purchaser from him (the ancestor) and one from his heir, Arza. In relation to a purchase from Arza, the difficulty is that he never had any title."

The same distinction was made in *Hancock v. Beverly's Heirs*, in 6 B. Monr., Ky., 531. The judge delivering the opinion acknowledges the question to be a doubtful and difficult one, and in reasoning upon the subject says: "It has always been held that a deed, though never recorded, is good between the parties, and as to all the world, except creditors and innocent purchasers for value. \*The grantor in such deed can pass no title to his subsequent donee or devisee, and the law will pass none to his heir, because there was none in him, after his conveyance, to be passed, but in favor of a creditor or *bona fide* purchaser for value. Does the conveyance of the heir, or donee or devisee, who, as such, never had title, made to a purchaser for value and without notice, operate to divest the title conveyed by the unrecorded deed, and, bringing it in another line of conveyances, vest it in subsequent purchasers?" This question the court, on the authority of *Ralls v. Graham*, 4 Monr. 120, answers in the negative.

Our own court, in *McCamant v. Patterson*, 39 Mo. 110-11, seems to recognize the same doctrine, though, from the peculiarity of the title to the New Madrid grants, the question in its general application could not have arisen in that case.

Other authorities, however, equally respectable, have held that the heir of the grantor in an unrecorded deed can convey a good title to an innocent purchaser for value. The Supreme Court of Pennsylvania, in *Powers v. McFarren*, 2 Serg. & R. 44, in giving its opinion, remarks that "the purchaser for a valuable consideration, seeing no deed on record, had a right, under the sanction of the recording act, to take for granted that the whole estate had descended." The same question was raised in *McCulloch v. Eudaly*, 3 Yerg., Tenn., 346, and in sustaining a deed from the heir, the following language is used by the court: "But it is contended that this (the saving to subsequent purchasers) only

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Youngblood, Adm'r of Tuley, v. Vastine, Adm'r of Wright, et al.

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applies to cases where the purchase should be made from the same vendor by whom the prior deed was executed. It is true the subsequent purchaser must hold under the same title; but whether he holds under the ancestor or heir, it can make no difference. The estate is thrown upon the heir with all the rights the ancestor enjoyed and subject to all encumbrances he had created on it."

The subject has also been considered in the State of Illinois, in *Kennedy v. Northrup*, 15 Ill. 148; and after reviewing the authorities, the title from the heir was sustained. "After much reflection," says the judge who delivered the opinion, "I am satisfied that this is the true and proper construction of the statute. It meets the object designed to be accomplished by the law, and is within the reason which gave rise to the enactment. It was the object of the Legislature to make patent the titles to real estate, that purchasers might know what titles they were acquiring. Where a deed is not recorded, the title is apparently still in the grantor, and the law authorizes purchasers who are ignorant of the conveyance to deal with him as the real owner. In case of his death the heir becomes the apparent owner of the legal title, and it is equally important and equally as just that the public may be allowed to deal with him as with the original grantor if living."

There is no substantial difference between the statutes of the different States whose decisions I have quoted and our own. Different language is used, but the same result is aimed at; some expressly declaring unrecorded deeds to be void against subsequent purchasers, while ours negatively does the same thing by saying that no such instrument shall be valid except between the parties thereto, etc.

The discrepancy in the authorities has doubtless arisen in part from the endeavor to reconcile the statute with the subtleties of the old law of tenures, which treats a title as a substantial entity, and almost applies to it the powers of locomotion. The attempt involves the reasoner in contradictions, for in one breath it is said that the title passes by the deed to the grantee and still so remains with the grantor, that in a contingency, it may again

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Babcock v. Babcock.

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pass from him to another grantee, but if the grantor dies it can not descend like all his other titles, but goes back to the original grantee, with whom it has always remained.

It would be more rational to say that the law controls the manner in which rights of property are acquired, and that it will not favor any mode of acquirement that shall encourage fraud. Thus purchasers are required to spread upon record the evidence of their ownership; and if others suffer from their neglect, the law will not recognize such ownership. Or, in using the language of the law of tenures, we might perhaps say that in a conveyance the absolute title rests with the grantor and his heirs in abeyance, to vest irrevocably only upon the record of the deed, and that it will vest in the first grantee in condition to receive the grant, who shall so place it upon record.

The Circuit Court held that the defendant's deed from the heirs of Mrs. Wright conveyed the whole estate, whereupon the plaintiff took a nonsuit, and his motion to set the same aside was overruled. In this the court committed no error, and the other judges concurring, the judgment will be affirmed.

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OLIVER M. BABCOCK, Defendant in Error, v. GEORGE BABCOCK,  
Plaintiff in Error.

1. *Practice, civil—Evidence—Laws of sister States must be proved like other facts.*—In the trial of a cause, the laws of another State are to be given in evidence like any other facts; and when the record shows no evidence proving them, instructions based on them are properly refused.
2. *Practice, civil—Evidence—Rebuttal—New matter can not be gone into.*—A party can not go into proof of new and independent matter in rebuttal, and courts are fully warranted in excluding evidence of this description.

*Error to St. Louis Circuit Court.*

*R. F. Wingate*, for plaintiff in error.

The agreement relied on by plaintiff was champertous; contrary to public policy, and hence void as to both parties; and the court erred in refusing the fourth and fifth instructions. (Gen. Stat.

1865, p. 558; 13 Ind. 117; Chit. on Cont. 657-8.) If the contract was void, the jury, under the second instruction given by the court, should have allowed the defendant for the value of his services and the moneys expended by him in the prosecution of the suits.

*Lucien Eaton*, for defendant in error.

I. On the pleadings the second count was confessed, and the plaintiff was entitled to judgment for the amount claimed and interest; yet each instruction which was refused concluded with a direction to find generally for the defendant.

II. No champertous contract appeared in the pleadings. The defendant can not defeat a recovery by setting up outside the pleadings a champertous contract made by him. If there was such a contract, and it were void, then defendant could retain of plaintiff's money nothing, or at best the value of his services and his legitimate and proper expenses.

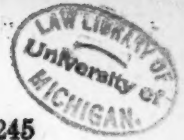
III. The attempted proof of a new contract by defendant when recalled, in rebuttal, was too late.

IV. The laws of Illinois must be proved as any other fact.

CURRIER, Judge, delivered the opinion of the court.

The petition in this cause contains two counts; the first being for money had and received, and the second being for money (\$100) advanced. The answer contains no specific denial of any of the material allegations in either count, nor does it set up any defense to the cause of action secondly stated in the petition. As to the cause of action set out in the first count, the defendant pleads accord and satisfaction. The answer shows that the defendant was employed to prosecute a suit against the St. Louis, Alton and Terre Haute Railroad Company for alleged injuries to the plaintiff's wife, claimed to have resulted from the negligence of the railroad company's servants; that a suit was accordingly commenced in favor of the plaintiff and his wife against the company, which resulted in a compromise settlement, after a trial and verdict for the plaintiffs, whereby the railroad company agreed to pay and did pay over to the present defendant the sum





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Babcock v. Babcock.

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of \$5,090 in discharge of said suit and cause of action, as also in discharge of a suit and cause of action in which the present plaintiff was suing for personal injuries to himself. The answer then proceeds to show that the defendant had disbursed considerable sums of money in prosecuting the suits against the railroad company, and that his personal services therein were of the value of \$2,500; that he accounted with the plaintiff in respect to his disbursements, services, and collections, and that upon such accounting he paid over to the plaintiff the sum of \$2,500 as the full balance due him; that the same was accepted and received by the plaintiff in full satisfaction and payment of all his claims upon the fund in the defendant's hands, the balance of \$2,590 being allowed to the defendant for his disbursements and services. The plaintiff, by his replication, admitted the employment of the defendant to prosecute said suits, but denied the alleged value of his services and disbursements, as also the alleged facts of settlement, and alleged that the defendant took the suits to prosecute upon a contingent fee, to-wit: twenty-five per cent. of the recovery.

At the trial, the defendant took the affirmation and gave evidence tending to prove the facts alleged by him in defense. The plaintiff then gave evidence in rebuttal and in support of the averments of his replication, whereupon the defendant offered and was permitted to give evidence tending to show that the contract, mentioned in the plaintiff's replication, for a prosecution of said suits upon a contingent fee of twenty-five per cent. of the anticipated recovery, was rescinded and set aside. He further offered to show that a new and independent contract was entered into, by which he was to have one-half the proceeds of the litigation. This proffered evidence was objected to and excluded, and the defendant complains of the exclusion as erroneous and prejudicial to him. He also complains of the action of the court in refusing instructions asked by him.

The first two instructions asked by the defendant assume that the laws of Illinois, where the railroad suits were prosecuted and where the plaintiff and his wife resided, make the damages recovered for injuries to the wife the separate estate of the wife.



But the laws of Illinois on this subject, if relied upon, should have been proved at the trial like other facts. There is no evidence in the record on which to base the proposed instructions. Moreover, the instructions are addressed to no issue in the case. The defendant, by his answer, admits the plaintiff's original cause of action, and pleads accord and satisfaction in bar of it. The defendant's third instruction relates to this issue, and although refused in the form in which it was asked, was nevertheless given by the court in corrected phraseology and so as to present the issue fairly to the jury.

The defendant's fourth and fifth instructions hypothecate certain facts which are supposed to constitute champerty, and direct the jury, if they find these facts to be true, to return a verdict for the defendant. Had the instructions directed the jury, in case they found the supposed facts, to disregard the contract set up in the plaintiff's replication as being champertous and void, there would have been better ground for complaining of their refusal. But the instructions, as asked, not only directed the jury to treat the supposed champertous contract as void, but to find against the plaintiff on the whole case. It did not follow, from the invalidity of that contract, that the plaintiff was not entitled to recover anything. Besides, the court treated the contract as invalid, by its instruction by which the jury were directed to allow the defendant for all his proper disbursements on the plaintiff's account, and also for the reasonable value of his professional services. This put the contract out of the case, and left the jury free to pass upon the question of the defendant's services and expenditures untrammelled by its provisions. This is all the defendant had any right to ask. The defendant's sixth and last instruction is based upon the hypothesis that the plaintiff, by a new, subsequent, and independent contract, had agreed to allow the defendant one-half the proceeds of the Illinois suits. But the court had ruled out the evidence on which this instruction was sought to be based, and this brings us to a consideration of the action of the court on that subject. Under the pleadings the defendant held the affirmative, and went forward. The plaintiff followed, and after his testimony was closed the defendant was allowed to put in evidence

to rebut the case made upon the plaintiff's replication. But he wished to go further, and set up an entirely new and independent matter, to-wit: a contract by which he was to have half the proceeds of the Illinois suits. He was too late, and the court was fully warranted in excluding the evidence on that subject. If it was admissible at any stage of the proceedings, it should have been offered in the first instance, while the defendant was seeking to support the case made by his answer. That was the case for him to maintain under the pleadings; his other proofs were in rebuttal. But he sought to go beyond this and raise a fresh issue.

I have gone through the defendant's instructions, which were refused by the court, in detail; but there is one fatal vice common to them all, which justified their rejection, aside from the particular objections already noticed. On the face of the pleadings the plaintiff was entitled to judgment on his second count. This fact was entirely disregarded by the defendant's instructions, each one of them concluding with a general direction to the jury to find for the defendant on the whole case if they found the recited facts. The court very properly refused these instructions, and gave others which put the case to the jury with fairness and liberality toward the defendant. The jury may have misjudged as to the amount of the defendant's disbursements and the value of his services. If so, it was through no fault of the court. They were directed to allow the defendant for his expenditures and whatever his services were worth, which was all the defendant had any right to demand. The court, in fact, went beyond what the pleadings warranted in telling the jury to find for the defendant on the whole case if they believed from the evidence that the plaintiff received and accepted \$2,500 in full for the balance of moneys collected by the defendant. This ignores the second count, which was not for moneys collected, but was for moneys which the plaintiff had advanced to the defendant, according to the averments of his second count.

For the reasons stated the judgment will be affirmed. The other judges concur.

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Schaeffer v. The Missouri Home Ins. Co. et al.

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NICHOLAS SCHAEFFER, Respondent, v. THE MISSOURI HOME INSURANCE COMPANY, JOHN FINN, STOCKHOLDER, Appellant.

1. *Insurance company—Judgment against, prima facie evidence of its corporate existence.*—For the purpose of a motion against the stockholders of an insurance company, a judgment against the company is *prima facie* evidence of its corporate existence at the time the judgment was rendered. If the stockholder would resist his liability as such on the ground of irregularities in the organization of the company, or on the ground of deficiencies therein, he should point them out and make some proof of them.
2. *Insurance company—Subscription makes subscriber stockholder, though he fails to meet subsequent calls—Subscription fraudulently obtained, not necessarily void.*—The subscription for shares of stock in an insurance company made the subscriber a stockholder of the company, although he failed to meet the subsequent calls thereon; and it made no difference that certificates of stock were not in fact issued. And a subscription for stock fraudulently and collusively obtained is not necessarily void. Notwithstanding the fraud or collusion, the law will hold the parties bound by their subscriptions, and under obligations to comply with all the terms and responsibilities imposed upon them thereby.

*Appeal from St. Louis Circuit Court.*

R. S. McDonald, for appellant.

I. There was no proof that the Missouri Home Insurance Company was ever organized, or that it ever had a corporate existence for any purpose whatever. (See Gen. Stat. 1865, ch. 67, § 7; 10 Wend. 266.)

II. There is no proof that Finn signed articles of association, and not having signed he did not become a stockholder under the provisions of section 4. Then he was not liable on the paper introduced in evidence. (Troy R.R. Co. v. Tibbits, 18 Barb. 297; Poughkeepsie R.R. v. Griffin, 24 N. Y. 150.)

III. As Finn paid nothing, he was not a stockholder, and his pretended subscription can not be enforced. (Gen. Stat. 1865, ch. 67, § 4; Hibernia Turnpike Co. v. Henderson, 8 Serg. & R. 219.) This was a case of first impression in this court. The case decided in 31 Mo. 19, North Missouri R.R. v. Mills, is not a parallel one. There the company was chartered and organized, and there was a direct promise to pay, and the court alludes to

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Schaeffer v. The Missouri Home Ins. Co. et al.

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the promise to pay. In this case the signing is a mere preliminary step to a second signing. Here no amount is specified by the signer.

IV. The act of putting figures at the end of Finn's name, no matter by whom done, was a fraud and a forgery upon Finn.

V. This being an ordinary contract, and being in blank, is therefore void.

VI. The only competent proof of what the articles of association contain is by showing them in court; and further, by showing that they have been signed and filed in the office of the circuit clerk. (See *Erie R.R. Co. v. Owen*, 32 Barb. 616, in connection with section 4, chapter 67, Gen. Stat. 1865.)

*Slayback & Haessler*, for respondent.

CURRIER, Judge, delivered the opinion of the court.

The plaintiff recovered judgment against the Missouri Home Insurance Company, upon which an execution was duly issued against the effects of that company. It was returned *nulla bona*, whereupon the plaintiff, in pursuance of the statute (Wagn. Stat. 291, § 13), moved for an execution against John Finn, the defendant herein. The motion recited the fact of the judgment and of the return of the execution as above stated, and then alleged that Finn held ten shares of the capital stock of said insurance company, of the par value of \$1,000. On the hearing of the motion before the court, but one point was contested, namely: whether Finn was a stockholder as alleged. The plaintiff gave evidence tending to show that he was, and the court so found the fact to be. But the defendant complains of the action of the court in refusing certain declarations of law, one of which was to the effect that the plaintiff was not entitled to recover. This declaration is based upon the assumption that the corporate existence of the insurance company was not sufficiently shown. For the purposes of the motion, we think the judgment against the company was *prima facie* evidence of its corporate existence, at the time that judgment was rendered. So much is implied in the judgment, and this is merely a proceeding for an execution



thereon against Finn as a stockholder. If he would resist his liabilities as such on the ground of irregularities in the organization of the company, or on the ground of defects and deficiencies therein, he should point out such irregularities, defects, or deficiencies, and make some proof of them. He did neither. There was no written answer to the plaintiff's motion, nor was there any proof submitted at the trial on the part of the defendant, except on the single point of his subscription for stock and his subsequent acts in relation thereto. This disposes of the main matters urged in this court. The other instructions refused either lacked a basis of evidence on which to found them, or announced incorrect propositions of law.

The court found, as a matter of fact, that the defendant subscribed for ten shares of the stock. That constituted him a "stockholder" within the meaning of the statute, although he failed to meet the subsequent calls thereon. The company might have sued him on his contract of subscription, and enforced the payment of the assessments, as he might have paid the assessments and insisted upon his right to the stock. The subscription constituted a contract between him and the company, and secured certain rights which the parties respectively might enforce (Ang. & Ames on Corp., § 517), and it made no difference that certificates of stock were not in fact issued. (*Id.*, § 565.) A subscription for stock fraudulently and collusively made is not necessarily void. Notwithstanding the fraud or collusion, the law will hold the parties bound by their subscriptions, and compellable to comply with all the terms and responsibilities imposed upon them thereby. (*Id.*, § 146.) These responsibilities can not be evaded by a mere notice to the officers of the corporation that the subscriber does not choose to take stock in accordance with the subscription contract.

The judgment will be affirmed. The other judges concur.



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Miltenerberger v. Morrison.

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EUGENE MILTENBERGER, Plaintiff in Error, *v.* PATIENCE C.  
MORRISON, Defendant in Error.

1. *Deed of trust notes — Sale — Purchaser.*—Deed of trust notes may be bought up, and the purchaser may sell out and buy in the property conveyed in trust for their security.

*Error to St. Louis Circuit Court.*

*T. T. Gantt*, for plaintiff in error.

*Cline, Jamison & Day*, for defendant in error.

CURRIER, Judge, delivered the opinion of the court.

The pleadings in this case differs from the pleadings in Miltenberger v. Morrison, 39 Mo. 71, in this: that the petition in the present suit contains an additional averment to the effect that the defendant fraudulently combined with the plaintiff's debtor, Wonderly, to prevent competition and to suppress bidding at a public sale of the property in controversy, whereby, as it is alleged, the rights of the plaintiff were prejudiced, and the defendant was enabled to acquire the property at a reduced and inadequate price. That is the gist of the present complaint. The general facts of the case are substantially the same as in the former suit, and do not require to be re-stated here. Wonderly, as the case shows, was the owner of lots 15 and 16 in block 896 of the city of St. Louis, and encumbered them with two deeds of trust to secure the payment of notes amounting to some \$4,500. In June, 1860, the deeds of trust still remaining on the property, he sold to the defendant, Mrs. Morrison, lot 16, and conveyed it, with the house thereon, by deed of warranty. His affairs becoming embarrassed, Mrs. Morrison became uneasy about the title to the property she had purchased of him, and for which she had paid him in full.

With a view to her own protection, and in order to throw the whole weight of the encumbrance upon lot 15 alone, she bought up the deed of trust notes, and at a sale under the deed of trust purchased both lots at a sum less than the aggregate of the

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Miltenerberger v. Morrison.

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encumbrances. In the meanwhile the plaintiff had obtained a judgment against Wonderly for some \$800, in an attachment suit, and levied upon and sold out his (Wonderly's) equity of redemption in lot 15. The plaintiff purchased the equity at the sheriff's sale, and thus acquired the right to any surplus that might remain after satisfying the deed of trust encumbering the property. No surplus was produced by the sale under the deed of trust, as already stated, and the complaint is that Mrs. Morrison, in fraudulent combination with Wonderly, prevented competition at that sale, and stifled the bidding.

In my opinion the evidence does not sustain the complaint. It was Mrs. Morrison's right, if she chose to exercise it, to buy up the deed of trust notes, and to sell out and buy in the property which had been conveyed in trust for their security. She did so, and the controlling motive of her action in that behalf, as the evidence clearly shows, was to protect herself against the encumbrance on lot 16, which she had purchased and paid for. She was friendly to Wonderly, but there is nothing to show that the idea of joining him in a scheme to cheat and defraud his creditors was ever present to her mind. Her anxiety was to get her lot relieved from the encumbrance Wonderly had placed upon it. She does not appear to have relied on him in the direction of the business, but employed other parties to look into the matter, and do whatever might be legal and requisite for her individual security and protection. Apparently not familiar with such affairs herself, she intrusted her interest to the sole supervision and direction of her agent, Mr. Brown, and her attorney, Mr. Hitchcock. Brown did but little more than employ Hitchcock, whose mind thenceforward became the directing agency in the transaction in question.

Early in 1861, and prior to the trustees' sales, Brown and Hitchcock, representing Mrs. Morrison, had an interview with Wonderly and his attorneys. Wonderly wished to save lot 15 for himself or family, and Mrs. Morrison wished to get rid of the encumbrance on lot 16. At this conference the understanding was reached that Mrs. Morrison would purchase the notes secured by the trust deeds, and sell the property under the deeds, as she

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Miltenberger v. Morrison.

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subsequently did. It seems also to have been further understood that in case she should become the purchaser of the two lots at the contemplated sales, she would be willing to convey lot 15 to Wonderly, or to such person as he might appoint, on being reimbursed her advances and expenditures, her only object being to protect her interest in lot 16. In regard to a redemption of lot 15 by Wonderly, Mr. Hitchcock testified: "I stated my information to be that Mrs. Morrison was kindly disposed toward Wonderly, and I thought it very likely after she got the title she would deal very kindly with him; but I declined to make any promise or agreement to that effect whatever," further testifying that "no contract, agreement, or promise" that Wonderly might redeem was made to his knowledge. Mr. Burnes does not specifically contradict this, but states what he "understood" to be the "effect" of what was said and done at that interview. The result of the extended testimony on this point is, that while Mrs. Morrison's agents refused to commit her to any express agreement to convey on the conditions named, still Wonderly and his attorneys left the conference with a confident belief that she would do so, and that Mrs. Morrison's attorney entertained the same opinion.

Nothing was said at the conference, or at any time, so far as appears, respecting the mode and manner of conducting the anticipated sales; nothing suggestive of a purpose to avert competition. In June, 1862, Mr. Morrison having purchased the notes, lot 15 was sold under the deeds of trust, and bought in by her agent. There had been prior sales of both lots, but the chief controversy gathers about this point. Her advances at this time, with the accumulating interest and expenses, exceeded \$5,000. The salable value of the property was then greatly depressed, and the testimony tends to show that \$5,000 or \$6,000 was as much as the property, lot 15, would command at that time at a deed of trust sale, under ordinary circumstances.

Wonderly's attorney, Mr. Burnes, was present with his client at the sale, and bid on the property against Mr. Hitchcock, who was present as Mrs. Morrison's attorney, bidding in her behalf. Mr. Burnes testifies that in the progress of the competition, Mr.

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Miltenerger v. Morrison.

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Hitchcock inquired of him why he was bidding, and that Hitchcock seemed surprised and displeased on account of it. Burnes also testifies that he inferred this from Hitchcock's tone and manner, and therefore ceased to bid. Hitchcock testifies that he has no recollection of any such occurrence as taking place during the sale, but he thinks that he made the inquiry referred to after the sale, and as he and Mr. Burnes were leaving the place in company; that he was led to make the inquiry because Mr. Burnes had previously refused to take the property and pay cash for it, and the sale was for cash; that it would have been "most satisfactory" if Mr. Burnes would have taken the property for the amount of debts against it; that to have discouraged him from doing so would have been "contrary to the theory on which he had managed the whole matter," and that he had "no object in doing anything of the kind." The whole current of the testimony shows that Mrs. Morrison's anxiety at the time was to get back the money she had expended in protecting her title to lot 16. Hitchcock went to the sale prepared to bid that amount and no more. Whether the inquiry in regard to the reason of Mr. Burnes' bidding occurred at or after the sale, the evidence makes it clear that he misinterpreted the purpose of it.

Aside from this matter and the acts of Wonderly, for which Mrs. Morrison was not responsible, there is nothing to show that the sale was in any respect unfairly conducted. As has already been observed, the allegation that it was so is not sustained by the proofs. The proof shows with much greater clearness that Miltenerger is but a nominal plaintiff, with no actual interest in the result of the litigation, and that this suit is being prosecuted in the interest of Wonderly, one of the parties to the alleged fraud.

With the concurrence of the other judges, the judgment will be affirmed.

CASES  
ARGUED AND DETERMINED  
IN  
THE SUPREME COURT  
OF  
THE STATE OF MISSOURI,

JULY TERM, 1870, AT JEFFERSON CITY.

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JOHN D. WOOD, Plaintiff in Error, v. L. F. MESSERLY *et al.*,  
Defendants in Error.

1. *Executions levied second term after judgment.*—The act of March 23, 1863 (Sess. Acts 1863, p. 20), going into operation after the issue but before the expiration of an execution, extended it and the lien of the levy on real estate created by it till the next term of court at which the land could be sold, even though it were later than the second term after the date of judgment. The use of the future tense in the words "shall not be sold at the next term," etc., refers to the date of the execution and not that of the act, and its provisions are not confined to cases where the failure to sell arose after the passage of the act. No *venditioni exponas* or new execution was necessary unless the old one had been returned.

*Error to First District Court.*

*Ewing & Smith*, with *Burke & Howard*, for plaintiff in error.

I. The execution under the above statute continued in force until the March term, 1863, when it became *functus officio*. If it was then intended to revive or continue the levy in force, it was necessary either to procure from the court a writ of *venditioni*



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Wood v. Messerly et al.

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*exponas* or to cause the issue of said execution anew under the provisions of the act of March, 1863 (Sess. Acts 1863, p. 20). It was impossible to impart life to the executions beyond the second term of court of issue, unless the two methods provided by law were resorted to. (36 Mo. 115; 2 Tidd's Pr. 1019; Lackey v. Lubke, 36 Mo. 115.)

II. The case relied on in 43 Mo. 322, by defendants in error, has no application to the case at bar. The execution now under consideration was issued prior to the passage of the law of 1863, and the case in 43 Mo. 322 was where an execution was issued under the act of 1863.

*Draffen & Muir*, and *John W. Moore*, for defendants in error, relied on Sess. Acts 1863, p. 20, § 2; R. C. 1855, execution act, § 54.

BLISS, Judge, delivered the opinion of the court.

The plaintiff brings ejectment, and derives title by deed from one K. H. Wood, and defendants hold possession as purchasers upon execution against him. The plaintiff seeks to defeat defendants' title through the execution for the reason, as he claims, that it was *functus officio* at the time of the sale. It appears that it was issued in March, 1862, returnable at the next September term; that the property was duly levied upon and advertised for sale at said September term, but the court adjourned before the day of sale. A sale being thus rendered impossible, "without fault of the officer," the execution was continued in force by the provisions of section 54, chapter 63, page 748, of the revision of 1855, which provides that where a sale can not be made at the first term in which it is to be made, it shall be continued to the end of the second term; so that, for the purposes of sale, this execution was kept alive until the end of the March term, 1863. But the record shows that no March term was held, and the sale was not actually made until the September term, 1863. This the plaintiff contends was altogether too late; the execution was dead, and, without a *venditioni exponas*, the sale could not be made, and was a nullity.

The defendants would sustain the sale by the provisions of two different acts. First, they rely upon section 56 of chapter 47, page 541, of the revision of 1855, which provides that no writ, process, etc., shall be deemed discontinued or abated by reason of the failure of any term of court, etc., but that the same shall be continued, etc.; and Judge Scott, in *The Bank v. Wells*, 12 Mo. 361, seems to give this effect to the act, though it is not quite certain whether the execution is sustained in that case by this act or by another one cited, or by both together.

The other act upon which the defendants in the case at bar rely is that of March 23, 1863, which provides, first, for the revival of dormant executions, and second, "that those now issued, or that may hereafter be issued, and levied upon real estate, if it shall not be sold at the next term from which the execution has been or may be issued, the execution and lien shall continue until a term of court when it can be sold." This statute has been fully considered by this court in *Stewart v. Severance*, 43 Mo. 322, and in *McDonald v. Gronefeld*, 45 Mo. 28, and full effect is given to all its beneficent provisions. The only question now to be considered is whether they apply to executions like the one under consideration, and of this I have no doubt. The second section provides, first, for executions already issued and levied, or to be issued and levied. This execution had been issued, was still alive, and the levy had been made. It provides also for cases where the real estate shall not be sold at the next term from which it has been issued. In this case the real estate was not sold for the reason before given. It provides that the execution and the lien should continue until a term when it can be sold, which in this case was the September term following. The only possible objection to this construction arises from a mere verbal criticism upon the tense of the term "shall not be sold," etc., seeking to make the provision apply only to cases where the failure to sell shall arise after the passage of the act. This is seeking to subject the object and spirit of the act to the letter. But this verbal criticism will not stand, for it is evident that the future tense, "shall not be sold at the next term," etc., has reference not to the date of the act, but to the date of the execution.

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 Burke v. Miller et al.
 

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If there were any doubt whatever as to the effect of section 2 of the act, it is removed by the clear provisions of section 1, which revives "all executions heretofore issued and not satisfied." This act of 1863, then, going into effect a few days before the expiration of the execution, extends it and the lien of the levy until the sale in September following. No *venditioni exponas* or new execution was necessary unless the old one had been returned, and the claim of the plaintiff in this regard is without foundation.

The plaintiff also complains of some of the declarations of law by the court, and that its finding did not conform to others. But it is of no consequence what these declarations were. The material facts are undisputed, and, as matter of law, they vest the title in the defendants.

The judgment, therefore, of the court was correct, and is affirmed. The other judges concur.

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EDMUND BURKE, Plaintiff in Error, v. ELIJAH MILLER AND GILES LEE, Defendants in Error.

1. *Justice's court—Transcript—Lien in Circuit Courts—Execution.*—Under sections 16 and 17, p. 961, R. C. 1855 (Wagn. Stat. 839, §§ 13, 14), the plaintiff may cause a transcript of his judgment before a justice to be filed with the circuit clerk at any time after the rendition of the judgment, without waiting for a return of *nulla bona* by the constable, and by so doing will create a lien on the real estate of defendant in the judgment from the time of filing. But the enforcement of the lien will be stayed until the return of *nulla bona* by the constable.
2. *Justice's court—Transcript—Records of, certified in Circuit Court, proof of issue of execution.*—The records certified from the office of the clerk of a Circuit Court are competent proof of the issue and return of the justice's execution. (*Franse v. Owens*, 25 Mo. 329, affirmed.)

*Error to First District Court.*

*Ewing & Smith*, with *Owens & Wood*, for plaintiff in error.

I. The judgment being for more than the justice had jurisdiction, the same is void, and no title passes by a sale thereunder. (8 Mo. 264.) The transcripts offered in evidence were

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Burke v. Miller et al.

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inadmissible. They do not correspond with the judgment recited in the said deed.

II. The executions could not issue on transcripts from clerk's office until the executions issued by the justice had been legally returned, and it was otherwise in this case.

III. The records of the transcripts of judgments do not show that a return was indorsed on the executions issued by the justice *nulla bona*, as the law requires; nor was there any other evidence of that fact filed in clerk's office. (R. C. 1855, p. 962, § 19.) The mere statement of the fact contained in the certificate of the justice of the peace is not sufficient to show such return. The "indorsement of the constable on the execution" must be certified by the justice. (Carr v. Youse, 39 Mo. 346; Murray v. Laften, 15 Mo. 621.)

*Gordon, Draffen & Muir*, for defendants in error.

The court decided correctly in permitting the defendant, Giles Lee, to read in evidence the sheriff's deed under which he claims title, as the sale took place under execution issued on transcripts of a justice of the peace, which had been filed in the circuit clerk's office. The deed is sufficient and contains all the recitals required by the statute. (43 Mo. 322; Jackson v. Walker, 4 Wend. 463; Brown v. Betts, 13 Wend. 30.)

CURRIER, Judge, delivered the opinion of the court.

This is an action of ejectment. In the progress of the trial of the cause the defendants offered and read in evidence, against the objections of the plaintiff, a sheriff's deed which purported to convey the premises in dispute to one of the defendants. The deed recited a justice's judgment for \$451.34; the filing of four transcripts in the office of the clerk of the Circuit Court; the issue thereupon by the clerk of four executions to the sheriff of the county, and the advertising and sale thereon by him of said premises.

The defendants also introduced and read in evidence, against the objections of the plaintiff, "four records of the four several transcripts, as recorded in the record of transcripts in the circuit



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Burke v. Miller et al.

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clerk's office," showing four justice's judgments, aggregating \$451.34, and that executions had been issued thereon by the justice, with returns showing that no effects were found in the county whereon to levy the same. Upon the refusal of the court to exclude these records and the sheriff's deed from the consideration of the jury, the plaintiff submitted to a nonsuit, and the cause is brought here by writ of error.

The decision of the questions arising upon these records involves an examination of sections 16 and 17, article 7, of the act in relation to justices' courts. (R. C. 1855, p. 961, §§ 16, 17.) These sections are the same as sections 13 and 14, page 839, of Wagner's Statutes, and have constituted a part of the statute law of the State for many years. Although their provisions seem perfectly plain and intelligible, this court has nevertheless been repeatedly called upon to declare their meaning and determine the legal effect of acts done under them.

Section 16 makes it the duty of every justice of the peace to furnish to the party in whose favor he has rendered a judgment a certified transcript thereof "on demand." It then makes it the duty of the circuit clerk of the county in which the judgment was rendered, to file such transcript in his office upon its "production," and "to record the same in a book to be kept for that purpose," and to enter such judgment "forthwith" in his docket of court judgments, noting the time of filing. It is thus seen that the justice must furnish his transcript "on demand," and that the clerk is required to file it in his office, when produced for that purpose, "forthwith," entering the judgment on his judgment docket.

That a party, upon recovering a judgment before a justice, is at liberty at once to file the required transcript in the circuit clerk's office, and thereby secure the advantages contemplated by the statute, is, it would seem, too plain a proposition to admit of a doubt. But the contrary is insisted upon here. It is claimed, for substance, that the judgment creditor must consume the life of an execution in hunting for personal effects of the debtor; that the transcript can be filed so as to have effect, only after the justice's execution has run its course of sixty or ninety



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Burke v. Miller et al.

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days, and been returned unsatisfied for the want of personal effects whereon to levy it. This construction rests on artificial grounds, and is in contravention of the positive requirements of the statute. It can not be tolerated.

The only purpose and effect of filing the transcript is to create a lien upon real estate, as will be seen by an examination of the next succeeding section. That section (§ 17) provides that the judgment of the justice, upon the filing of the transcript, shall create a lien upon the debtor's real estate in the same manner as a judgment of the Circuit Court, and be enforced by its execution in the same manner as if it had been rendered in the latter court, except in one particular, namely: that no execution to enforce the justice's judgment shall issue from the Circuit Court until an execution has been issued by the justice, and "returned, that the defendant had no goods or chattels whereof to levy the same." It is this last clause that has occasioned all the difficulty that has been experienced in acting under the provisions of the two sections under review.

The Legislature evidently had in view two objects in the enactment of these sections, namely: first, the creation of a lien upon the judgment debtor's real estate, by filing a transcript in the Circuit Court in the manner stated; second, the enforcement of that lien by the process of a court of record. As we have seen, the lien might be created by filing the transcript with the circuit clerk at any time after the rendition of judgment by the justice. The enforcement of the lien, however, was stayed until an execution had been issued by the justice and returned *nulla bona* by the proper officer. This was to avoid any unnecessary seizure and sale of the debtor's real estate—a procedure liable to involve expenses beyond the amount of the judgment to be collected.

But how was the fact of the issue and return of the preliminary execution to be established? That is the principal question involved in the case at bar. The plaintiff insists that the records from the office of the circuit clerk, read in evidence by the defendants, were incompetent to show that fact, since they do not contain certified copies of the justice's executions and the respective returns thereon; and Carr v. Youse, 39 Mo. 346, is relied upon as an authority fully sustaining that view of the case.

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Burke v. Miller et al.

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Carr v. Youse is distinguishable from the case under examination in this: In that case the evidence relied upon to show the issue and return of the justice's execution, was the justice's certificate of the facts, embodied in a transcript of his docket, certified by him and from his office; "not by any certified transcript of the record from the office of the clerk of the court, nor even by a certified transcript of the execution and constable's return thereon from the office of the justice." The difference is material, and is strongly commented on by Gamble, J., in *Murray v. Laften*, 15 Mo. 621.

But were the records certified from the office of the clerk of the Circuit Court competent proof of the issue and return of the justice's execution? The decision of this court in *Fransé v. Owens*, 25 Mo. 329, answers this question in the affirmative. "The transcript in that case, as in this, was certified by the circuit clerk, and from the records in his office. The two cases, as to the point now under examination, are quite identical. The form of the record and the facts appearing of record are in form and substance the same. In neither record does the justice's execution or the return upon it, *in hæc verba*, appear; but the facts of the issue of the execution, and of the *nulla bona* return, are set out in the transcript from the office of the clerk of the Circuit Court. In accordance with the decision in *Fransé v. Owens*, and upon the ground of its essential reasonableness, we hold that to be sufficient. (See *Coonce v. Munday*, 3 Mo. 314.) The principle of the decision in *Ruby v. Hann. & St. Jo. R.R.*, 39 Mo. 480, fully sustains the conclusion reached in this opinion.

The point is made that the sheriff's deed, read in evidence, recited a judgment in excess of the jurisdiction of a justice of the peace. That does not appear upon the face of the deed. The judgment might have been against the defendant therein as a garnishee, and so above the ordinary limit of the jurisdiction of a justice. (*Davis v. Staples*, 45 Mo. 567.) But the transcripts subsequently given in evidence show that the judgments rendered by the justice were not in excess of his jurisdiction.

Judgment affirmed. The other judges concur.

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Caldwell v. Hawkins.

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ROBERT CALDWELL, Respondent, v. MADISON C. HAWKINS,  
Appellant.

1. *Practice, civil—District Court—Filing transcript—Duty of appellant.*—The filing of transcript in the office of the clerk of the District Court, at least fifteen days before the term to which an appeal is returnable, is a personal duty imposed upon the appellant (Gen. Stat. 1865, p. 547, § 29) which he can not transfer to the clerk; and in the event of his failure, the judgment, on motion of respondent, should be affirmed; and it will not avail appellant that he had several times asked the circuit clerk to make it out and send it up, and that the latter had promised to do so.

*Appeal from Fourth District Court.*

J. J. Louthan, for respondent.

J. G. Blair, for appellant.

BLISS, Judge, delivered the opinion of the court.

The plaintiff obtained judgment in the Circuit Court, and the defendant appealed. He failed to file his transcript at the next term of the District Court, and did not file it until less than fifteen days from the commencement of the second term. But during said term the respondent presented a transcript and obtained a judgment of affirmance of the one obtained by him in the Circuit Court. The defendant appeared, and resisted the motion to affirm upon the ground that he had used due diligence to obtain and file his transcript, but only showed that he and his attorney had spoken to the circuit clerk several times about making it out and sending it up; that he promised to do so, and that they relied upon the clerk to send it up.

The statute imposes upon the appellant the duty, in civil cases, of causing the transcript to be filed at least fifteen days before the term at which the appeal is returnable. It is a personal duty imposed upon the appellant, which he can not transfer to the clerk; and, for his failure, it becomes the duty of the District Court, upon motion of respondent, to affirm the judgment. The provisions of the statute are plain and imperative, and can not be dispensed with.

The judgment of the District Court is affirmed. The other judges concur.

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Stoker, Adm'r, etc., v. Crane.

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L. STOKER, ADMINISTRATOR, ETC., Respondent. v. JAMES H.  
CRANE, Appellant.

1. *Justice's court — Replevin — Statement — Venue.*—In suit for replevin before a justice, the statement that plaintiff was the owner and entitled to the possession of the property is sufficient, without an averment that plaintiff was lawfully entitled to it, and the venue is sufficiently laid if it appear in the margin.

*Appeal from Fourth District Court.*

*Matlock and Meryhew*, for respondent.

*J. G. Blair*, for appellant.

CURRIER, Judge, delivered the opinion of the court.

This is a replevin suit which was commenced before a justice of the peace, under the statute (Gen. Stat. 1865, p. 703, § 1). On appeal to the Circuit Court the plaintiff recovered judgment. The defendant moves in arrest on the ground of supposed radical deficiencies in the original statement filed with the justice. The statement shows that the plaintiff was the "owner and entitled to the possession" of the claimed property, and that the defendant wrongfully detained it, without stating any venue in the body of the complaint. The venue, however, appears in the margin. Following the prayer for judgment is this: "Washington Stoker, plaintiff, makes oath and says that, to the best of his knowledge and belief, the facts and allegations contained in the above statement are just and true." The paper was then signed by Stoker, and sworn to, the jurat being in the usual form.

The objections to the statement are that it fails to aver that the plaintiff was "lawfully" entitled to the possession of the property sued for; that no venue is laid in the body of it; and that it is not, as the defendant assumes, verified by affidavit.

As grounds for arresting the judgment, there is nothing in either of these objections, and the judgment will consequently be affirmed. The other judges concur.

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Holt v. Baldwin.

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JACOB HOLT, Defendant in Error, v. W. H. BALDWIN, Plaintiff  
in Error

1. *Contracts—Purchase by minor child must be shown to be made by child as agent of father—Subsequent ratification of itself not sufficient.*—A father can not be held liable for a purchase made by his minor son, on the sole ground of a supposed subsequent ratification of the purchase and a promise to pay the purchase money. The father can be held only on the ground that he authorized the purchase, either expressly or by implication. Whether or not there was such authority is a matter for the jury, and not for the court. The fact of the subsequent ratification and promise is legitimate and persuasive evidence, from which the jury may find that the purchase was made by the son as the father's agent, acting under authority either express or implied. But the moral obligation of the father to support his child does not make him legally liable to pay his child's debts. And to charge a father on his son's contracts, the same circumstances must be shown as to charge an uncle, a brother, or any third person.

*Error to First District Court.*

*Ewing & Smith, with Burke & Howard, for plaintiff in error*

I. The plaintiff's first instruction was erroneous. It left the jury to determine a bare and naked question of law. It was the duty of the court to tell the jury what was necessary to constitute the ratification by the principal of the unauthorized acts of the agent, so as to bind and charge the principal. A mere promise, after the sale, by defendant, to pay for the horse was not sufficient to support an action thereon. A principal, to ratify the unauthorized acts of an agent in the purchase of property, must receive the property or get the benefit of the unauthorized purchase; otherwise there is no ratification. This the court should have told the jury. (1 Am. Lead. Cas. 593; 12 N. H. 206; 5 Hill, 137; 4 Barb. 369, 374; 5 Dana, 530; 10 Ired. 8.)

II. The motion in arrest ought to have been sustained. There is but one count in the petition, and it blends two causes of action improperly therein: one on an *express* contract, where defendant himself, before the sale thereof, agreed to pay; the other on an *implied* contract. This blending of these two causes of action could not be thus tolerated in this one count. On demurrer or



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Holt v. Baldwin.

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motion in arrest, the court should have held the petition bad. (Clark's Adm'r v. Hann. & St. Jo. R.R. Co., 36 Mo. 202; 34 Mo. 134; 41 Mo. 257.)

*J. W. Moore*, with *Lay & Belch*, for defendant in error, urged among others the following points:

I. The assent of the defendant, at or before the purchase of the horse, was not necessary. His subsequent ratification of the contract is sufficient to show that his son acted as his agent, and to bind him. A father must pay a debt which he has authorized his infant son to contract, and that he has subsequently made a conditional promise to pay it is evidence of previous authority, the condition having been fulfilled. (Brown & McKay v. Deloach, 28 Ga. 486; 2 Kent's Com. 199, § 29; 51 Penn. St. 80; 1 Pars. on Cont. 297-9 *et seq.*)

II. However inartificially it may be drawn, the petition states a cause of action; and after verdict a motion in arrest would not be sustained.

CURRIER, Judge, delivered the opinion of the court.

The plaintiff sues to recover the purchase money of a horse sold to the defendant's minor son. The petition shows, for substance, that a minor son of the defendant was engaged in the military service of the State, with his father's consent and approbation; that a horse was necessary for the use of the son in his employment; and that the son, under the authority of the father, purchased the horse in question, and took possession of him, and that his father, the defendant, subsequently ratified the transaction, and promised to pay the plaintiff the sum agreed upon as the purchase money of the horse. These facts are somewhat scatteringly detailed in the petition, but they are sufficiently stated to show a good, and, at the same time, but one cause of action. The defendant's motion in arrest was therefore properly overruled.

The defendant's answer denies the principal matters alleged in the petition, and avers that the defendant furnished his son with

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Holt v. Baldwin.

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everything necessary to his circumstances and condition. Upon these issues a trial was had by jury.

At the instance of the plaintiff, the court instructed the jury as follows: "If the jury find from the evidence that the defendant, after the sale of said horse to his minor son, ratified the act and promised to pay for said horse, they will find for the plaintiff." Aside from an instruction in relation to the *quantum* of damages, this was the only instruction given in the case. It is radically defective. It assumes as a matter of law what should have been left to the jury to determine as a question of fact. The instruction assumes and declares the liability of the defendant upon the sole ground of his supposed subsequent ratification and promise, leaving out of view entirely the question of the son's agency in the transaction. If the defendant was liable at all, it was because he had authorized the purchase, either expressly or by implication. Whether there was any such express or implied authority was a matter for the jury to inquire into, and not for the court to assume as a matter of law. The fact of a subsequent ratification and promise was legitimate and persuasive evidence to go to the jury, from which they might have found that the purchase was made by the son as the defendant's agent, acting under authority either expressed or implied. (*Brown v. Deloach*, 28 Ga. 486.)

"The moral obligation of a father to support his child does not make him legally liable to pay his child's debts; and to charge a father on his son's contracts, the same circumstances must be shown as to charge an uncle, a brother, or any third person. The son need not, however, have an express authority to bind his parent; for an authority may be implied under certain circumstances, and it is always a question for the jury whether the circumstances are sufficient for that purpose." (Tyler on Inf. and Cov. 106, § 64.) The general doctrine on this subject is that the "only ground upon which an infant can bind others by his contract is that of an express or implied agency." (*Id.*)

All the instructions asked by the defendant were refused by the court, and properly. The second instruction asked amounts to a demurrer to the petition; and the petition, as we have seen, was

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Foster et al. v. Davis.

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sufficient. Each of the remaining instructions leaves out of view the question of agency—the important and controlling element in the controversy—and were unwarranted for that reason.

The judgment, however, in consequence of the misdirection of the jury, as already explained, must be reversed and the cause remanded. The other judges concur.

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THOMAS M. FOSTER *et al.*, Defendants in Error, v. JAMES A. DAVIS, Plaintiff in Error.

1. *Trustee, larceny from, should appear as clearly as the case will admit of.*—Where a party standing in a fiduciary relation undertakes to discharge himself from responsibility for trust funds committed to his care, on the ground that such trust funds have been stolen from him, the fact of the loss, in the manner asserted, should be made to appear as clearly as the case will admit.

*Error to Second District Court.*

*Draffen & Muir*, with whom were *Burke & Howard*, for plaintiff in error.

*Ewing & Smith*, for defendants in error.

CURRIER, Judge, delivered the opinion of the court.

This is a proceeding in equity to open and readjust the account of the defendant as executor of the will of Williamson Foster, deceased. It is conceded that the facts alleged in the petition, if proved, will justify the relief prayed for. The contest is narrowed down to three items of credit which were allowed to the defendant on the final settlement of his administration account—one being for an uncollected note of \$11.06, one for an uncollected note of \$250, and one being for money claimed to have been stolen from the defendant, amounting to the sum of \$800. It is charged that these credits were fraudulently procured. Whether so, or not, is the question for decision. The issue is one of fact, and the proofs must determine it.

It is not considered that a labored review of the evidence would

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Foster et al. v. Davis.

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answer any useful purpose. I shall, therefore, in the main, content myself with stating results. I have examined the evidence carefully, and fail to find proofs of fraud in relation to the notes which would justify the opening of the account for re-examination, because of anything done by the defendant in procuring their allowance as credits. The credit of \$800 stands on a different footing. The sum of \$800 was credited to the defendant, upon his representations to the Probate Court to the effect that funds of the State to that amount had been stolen from him—that he had been robbed. If these representations were false, it is conceded that the account should be reformed. The fact of the robbery is not controverted; but the question is, was the defendant robbed of his own money, or was the robbery of funds belonging to the decedent's estate?

On the 10th of March, 1864, armed men in disguise entered the defendant's dwelling-house and rummaged it for plunder. A quantity of money was found concealed in a straw bed, which the robbers seized and carried away. The defendant testifies that no part of the money was his; that at that time he had no money; that \$800 of the money taken belonged to Foster's estate; that it was not the identical money which he had collected for the estate, but United States currency which he had taken in exchange for Missouri bank bills, and which he esteemed, as he testified, a better security; that \$750, of the \$800 taken by the robbers, was in the currency of the United States. He also testified that he had kept funds of the estate on hand from 1861 to the date of the robbery. It also appeared that he had represented, prior to the robbery, that he kept the funds of the estate buried where they could not be found, being induced to adopt this precaution on account of prevalent civil disorder.

It should be observed that where a party standing in a fiduciary relation undertakes to discharge himself from responsibility for trust funds committed to his care, on the ground that such funds have been stolen from him, the fact of the loss in the manner asserted should be made to appear as clearly as the nature of the case will admit. Such is not the showing here. The loss is claimed to have occurred at a time and in a community where and

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Foster et al. v. Davis.

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when violence and lawlessness were prevalent. Under such circumstances, why was so large an amount of money belonging to the estate withdrawn from its place of safe deposit in the ground and put at risk in the defendant's house? Or, if the \$800 had accumulated in any part from late collections, why were these collections not deposited with the other funds of the estate? It is evident from the defendant's account that there were other funds. These questions are not answered, although it is suggested that the money was wanted to pay taxes. There is no evidence that the estate owed taxes to the amount of \$800, or to an amount reaching anywhere in the vicinity of that sum. The defendant had ample funds for the purpose of paying taxes, and his account shows that he paid taxes to the amount of \$65.15. It is not shown that there were any other taxes against the estate.

As already observed, it appeared in evidence that the defendant, prior to the robbery, represented that the funds of the estate were kept safely buried. A member of his family, called by him as a witness, testified that the money stolen had been concealed in the house for three or four months next prior to the robbery, and that the money stolen was mainly "militia money," and not "greenbacks." The witness had every means of knowledge, and was positive as to the kind of money taken, describing the color of it as lighter than that of the greenback currency.

Had the defendant acted in good faith in this matter, and under the belief that the money taken was the property of the estate, it is quite incredible that he could have failed in some reasonable time to have notified the parties in interest of the fact of the loss. There is no pretense that he did so. On the contrary, it appears that he informed various persons that the money taken was his, making no mention of the estate in that connection. The defendant's claim is alone supported by his own swearing, and by testimony coming from members of his family, and that testimony is found to be, in some respects, in striking and most emphatic conflict. All the facts and circumstances of the case combine to oppose the theory upon which this defense is sought to be sustained. Upon a careful review of the evidence



preserved in the record, I am compelled to adopt the conclusion that the money taken by the robbers did not constitute any part of the assets of Foster's estate.

As already stated, the action of the court in disallowing the credits for the two uncollected notes was erroneous, and for that reason the judgment must be reversed; but there is no necessity for remanding the cause. The record shows that the parties prosecuting this suit are entitled to the avails of it. It also appears that Foster's estate has been fully settled, leaving nothing further for the executor to do. This court will therefore proceed to enter such judgment as the Circuit Court ought to have rendered. The plaintiff will take judgment here for the sum of \$800, together with the interest thereon since the date of the defendant's final settlement, making the aggregate sum of \$1,076.

Since the defendant was aggrieved by the judgment of the Circuit Court, he will recover his costs in this court. The other judges concur.

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JOHN W. SCRUGGS, Defendant in Error, v. JAMES A. SCRUGGS  
AND N. B. SCRUGGS, Plaintiffs in Error.

1. *Ejectment—Executions—Sheriff's amendment of return allowed, when.*—

The return upon an execution omitted to describe the real estate sold, but the sheriff's deed conveying the land described it minutely. In ejectment brought many years afterward against the original defendants in execution, *held*, that the sheriff not being dependent on his memory, but being furnished by the deed with the means of accurately supplying the defects, might amend his return so as to make it show what lands were sold and who was the purchaser. And this he might do although out of office; but *semble*, that the case would be otherwise where the rights of innocent purchasers might be affected. The suit being instituted long after the date of the return, the court properly refused to permit defendants to examine the sheriff as to his personal recollection of the facts of his return.

There is no limitation of time within which amendments of this class must be made, although after the lapse of years the court should grant applications with great caution; and the granting of them rests in the sound discretion of the court, and not as a matter of right. To be entitled to amend, the party should show the fact of a mistake beyond a reasonable doubt.

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Scruggs v. Scruggs et al.

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*Error to First District Court.*

This suit was commenced at the August term, 1868, of the Circuit Court of Cole county, more than twenty years after the original sale and deed.

*Lay & Belch*, for plaintiffs in error.

I. There is no pretense that the sheriff, when it is claimed that he made his levy, did any act to show what he had done, or attempted to make any sort of a return on the execution. Here the officer had nothing to amend from, and he was permitted by the court blindly, as it were, to make an entry *nunc pro tunc*, without its being made to appear how he knew that he was performing a duty then that he should have performed when sheriff, or what knowledge or recollection he had about it.

II. Amendments of all sorts are particularly discouraged by courts where the rights of third parties would be thereby affected. (3 Pick. 445; 8 Mass. 240; 23 Me. 505; 15 Me. 77; 17 Pick. 197; 14 Pick. 31; 6 N. H. 470; 4 Dana, 214; 13 Mass. 270; 10 N. H. 291; 28 Me. 301; 24 Me. 431; 13 Ohio, 220; 1 Dev., N. C., 304; 7 Greenl., Me., 146; 10 Me. 498; *Reach v. Fulton Bank*, 3 Wend. 573.)

*Ewing & Smith*, for defendant in error.

The only material question in this case, as we conceive, is as to the amendment of the sheriff's return, and this question is undoubtedly settled by 39 Mo. 500; *Blaisdell v. Steamer Wm. Pope*, 19 Mo. 157; *Irvine v. Scobee*, 5 Litt. 70; *Muldrow v. Bates*, 5 Mo. 214; *Corby v. Burns*, 36 Mo. 194; 7 Bac. Abr. 195. No third person is injured by the amendment.

CURRIER, Judge, delivered the opinion of the court.

This is an ejectment suit, and it is now here for the third time. (See 41 Mo. 242; 43 Mo. 142.) It is unnecessary to re-state its general facts. The main contest now gathers about the action of the court below in granting leave to amend the sheriff's return upon an execution.

The plaintiff deduces title from James A. Scruggs, one of the defendants, through a sheriff's deed to the former, executed to him in pursuance of a levy and sale under an execution against the latter. The return upon the execution shows that money was derived from a sale of real estate, but the return omits to describe the estate sold, although the deed executed in pursuance of the sale describes it minutely. The sale occurred August 19, 1846. The deed bears date March 16, 1847, and states in its recitals that the sale was duly advertised for twenty days in the *Jefferson Inquirer*, a newspaper published in the county where the land was situated. The deed was filed for record June 16, 1847.

In the progress of the trial, and against the defendant's objections, the court permitted the sheriff to amend his return; and the return was accordingly amended so as to show what lands were sold and who was the purchaser. Before the amendment was made, the defendant asked leave to examine the sheriff as to the facts of the levy and his means of knowledge respecting it, but the application was overruled.

The right of a sheriff to amend a defective return, on leave of the court, is beyond question, and it makes no difference that he is out of office. Such amendments, in appropriate cases, are allowed even on application of the sheriff's administrator. And there is no specific limitation of time within which this class of amendments must be made; although, after a lapse of years, the court should grant applications with great caution, lest the rights of innocent third parties should be injuriously affected. Such applications are not granted as a matter of right. The granting of them rests in the exercise of a sound discretion on the part of the court. "Amendments of this description," say the court in *Johnson v. Day*, 17 Pick. 108, "are not regulated by any certain rules; but the court is bound in every case to exercise a sound discretion, and to allow or disallow an amendment, as may best tend to the furtherance of justice. The forms of the court are always best used when they are made subservient to the justice of the case." (*Blaisdell v. Steamer Wm. Pope*, 19 Mo. 157; *Webster v. Blount*, 39 Mo. 500; *Stewart v. Stringer*, 4 Mo. 113; *Webb v. Joy*, 13 Pick. 477; *Fowble v. Walker*, 18—VOL. XLVI.

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Scruggs v. Scruggs et al.

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45 Ohio, 64; 4 How. 45; Gwynne on Sheriffs, 471; Haven v. Snow, 14 Pick. 28.)

Applying these tests to the action of the court in granting leave to amend, it does not appear that its discretion was improperly exercised. There was a palpable and fatal omission in the return, but the means of correcting the error were readily supplied by reference to the sheriff's deed executed at the time. The facts were all there in enduring form, and the deed had been on record for twenty years. The sheriff was not dependent on his memory for the means of supplying the defects of his return, or for the means of showing with certainty what its defects were. Undoubtedly a party moving for leave to amend should make out and show the mistake beyond any reasonable doubt. (Hovey v. Wait, 17 Pick. 196.) That was done in the case at bar; and the deed furnished the facts to amend by, and to amend with certain accuracy of result.

In Hovey v. Wait, the sheriff was not allowed to amend, for the reason that he had failed to make minutes of the transaction at the time of it, by which his return could be corrected, and some years had then elapsed. There was nothing to amend by. It was a matter of doubt whether the original return was not full and accurate, showing what was in fact done. There is no such doubt here.

But it is urged that the defendant, N. B. Scruggs, a son of the other defendant, was not concerned in the original sale by the sheriff, and that he was prejudiced by the amendment.

In 1863, after the sheriff's deed to the plaintiff's grantor had been on record for some fifteen years, and after both defendants had become fully advised of the whole transaction, James A. Scruggs, the father, made to his son and co-defendant a deed of the land described in the sheriff's deed; at least they both so swear, and that is all the evidence there was on the subject. No such deed appears in the case. Both defendants swear that the deed was without consideration, and the grantor, James A. Scruggs, testified on the stand that the deed was then in his possession, and that his son and co-defendant had refused to have anything to do with it. There was, in fact, no legal evidence of

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Cox v. Schroer.

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any conveyance between these parties. Neither of them is in a position to complain of the amendment as injurious to innocent and unsuspecting third parties having title to the property, acquired prior to the amendment, and which the amendment would defeat. They do not pretend that they were misled by the condition of the return prior to its amendment.

It is further objected that the court refused the defendants an opportunity to examine the sheriff as to the facts of his return. Under ordinary circumstances this action of the court would have been unwarrantable. It is not perceived, however, in the present instance, that the refusal operated any injury to the defendants. After the lapse of so many years, the sheriff could not amend his return from a mere personal recollection of the facts, and ought not to have been permitted to do so. He had the facts under his own hand and official signature, fully and minutely set out in the deed, and that was his guide. There is no suggestion that the return, as amended, fails to set out the facts truly. That being so, there is no solid ground for complaint that the defendants were not allowed an opportunity to pry into the extent of the sheriff's personal recollections. I discover nothing in the action of the court in giving and refusing instructions that would justify a reversal of the case on that ground.

The judgment will be affirmed. Judge Wagner concurs; Judge Bliss absent.

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S. W. Cox, Respondent, v. A. SCHROER, Appellant.

1. Judgment affirmed.

*Appeal from First District Court.*

*Geo. T. White and King & Bro.*, for appellant.

*Lay & Belch*, for respondent.

BLISS, Judge, delivered the opinion of the court.

The plaintiff brought ejectment in the Circuit Court of Cole county for a certain town lot in Jefferson City, and both parties



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Atwinger v. Fellner.

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claim under one Fulkerson. In 1850 Fulkerson deeded to one Dorris, and Dorris conveyed to the plaintiff in 1867. Fulkerson also, in 1859, conveyed to one Wm. Porth, and in 1866 defendant took possession under a verbal contract with Porth for its purchase. No question is raised in regard to the record of the conveyances, and it is seen at once that the clear paper title is in the plaintiff.

The defendant seems to rely upon the statute of limitations, but no adverse possession whatever is shown until taken by defendant in 1866, and the declarations of law upon that subject were properly refused, as there was nothing upon which to base them.

There is some testimony which, if sufficiently supported by other evidence, might perhaps raise an equity in favor of defendant. But no such equity is set up in the answer, and the little evidence there is upon the subject can not be considered.

The other judges concurring, the judgment is affirmed.

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JOHN ATWINGER, Defendant in Error, v. JOHN FELLNER,  
Plaintiff in Error.

1. *Practice, civil—Slander—Action for, need not state what.*—A petition in an action for slander is not fatally defective, under the present statute (2 Wagn. Stat. 1020, § 43), because it contains no allegation that the slanderous words were uttered in the presence of any one, or, being spoken in a foreign language, that they were understood by those present.

*Error to First District Court.*

*Johnson & Budd*, for plaintiff in error.

I. In a petition for words spoken it is necessary to aver that they were spoken in the presence of some person. (1 Stark. on Slander, 360; Sto. 70; 2 Mod. 41; Cro. Eliz. 861; Moss v. Thacker, 2 Lev. 193; Wood v. Gilchrist, 1 Code Rep. 117; 3 How. Pr. 406; Burbank v. Horn, 39 Me. 233; Bradshaw v. Perdue, 12 Ga. 510; Ware v. Cartledge, 24 Ala. 622; Townsh.

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Atwinger v. Fellner.

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on Sland. and Lib., § 324; *Burton v. Burton*, 3 Greenl., Iowa, 316; 1 Chit. Pl. 406-8; 2 Chit. Pl. 633-41; Nash's Pl. and Pr. 50, 215; 3 N. Y. Pr. 91.)

II. If the words be spoken in a foreign language, an averment is necessary to show that the hearers understood them; and if such averment is not made, the judgment may be arrested. (Cro. Eliz. 396, 496, 865; Cro. Jac. 39; Cro. Cur. 199; Noy, 59; Golds., 119; 8 Mod. 328; 1 Sandf. 342, note 1; Viner's Abr., tit. Actions for Words; Danv. Abr. 146; *Fleetwood v. Curley*, Hob. 267; *Amann v. Damm*, 8 C. B., N. S., 597; 1 Stark. on Sland. 361; *Heard on Sland.*, § 210; Townsh. on Sland. and Lib., § 324; *Wormouth v. Cramer*, 3 Wend. 395; *Lettmann v. Ritz*, 3 Sandf. 734; *Zeig v. Ort*, 3 Chandler, 26; 2 Greenl. Ev., § 414, note 7; *Debaix v. Leland*, 1 C. R., N. S., 325; 1 Chit. Pl. 406-8; *Bechtel v. Shatler*, Wright, 107; 9 Baa. Abr. 60-4; 1 Swain's Pr. Prec. 556, note 1, 583.)

III. The provision of the statute dispensing with the necessity of stating in a petition any extrinsic facts, for the purpose of showing the application to plaintiff of the defamatory matter out of which the cause of action arose (2 Wagn. Stat. 1020, § 43, note; N. Y. Code of Pr., § 164), applies only to such extrinsic facts as are necessary to show the application, but not to such facts as are necessary to show a publication of the words and the defamatory meaning of them. This provision was adopted in order to obviate the difficulty which was supposed to have been occasioned by the decision in *Muller v. Maxwell*, 16 Wend. 9. (*Pike v. Van Wormer*, 5 How. Pr. 171; *Pike v. Van Wormer*, 6 How. Pr. 99; *Fry v. Bennett*, 5 Sandf. 54; 9 N. Y. Leg. Abs. 330; 1 Code Rep., N. S., 238; *Caldwell v. Raymond*, 2 Abb. Pr. 193; *Blaisdell v. Raymond*, 4 Abb. Pr. 446; *Culver v. Van Anden*, *id.* 375; *Dias v. Short*, 16 How. Pr. 322; Nash's Pl. and Pr. 50, 215; *Fry v. Bennett*, 1 Code Rep., N. S., 247.)

IV. The case of *Steiber v. Wensel*, 19 Mo. 513, has no application to the question raised here. Neither has the form in which the petition is drawn ever received legislative sanction. (*Bowling v. McFarland*, 38 Mo. 465.) The case of *Keene v. Ruff*, 1 Iowa, 482, was a case of libel, and not in point.

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Atwinger v. Fellner.

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*Ewing & Smith*, for defendant in error.

The petition is as prescribed by the code, and is sufficient.  
(2 Wagn. Stat. 1397; *Steiber v. Wensel*, 19 Mo. 513.)

WAGNER, Judge, delivered the opinion of the court.

The motion in arrest brings up for our determination the sufficiency of the petition. The action was for slander, and the petition alleged that the defendant spoke in the German language the false and slanderous words of and concerning the plaintiff. There was no allegation that the words were uttered in the presence of any one, or that they were understood by those present. The petition was in substantial compliance with the code, and no objection was made to it; but an answer was filed containing a denial of the facts stated, and after verdict a motion in arrest of judgment was made.

Whether there was any fatal defect, so that the motion in arrest should have been sustained, is the sole matter for inquiry. The statute of this State provides that "in an action for libel or slander it shall not be necessary to state in the petition any extrinsic facts, for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose, but it shall be sufficient to state generally that the same was published or spoken of and concerning the plaintiff; and if such allegation be not controverted in the answer, it shall not be necessary to prove it on the trial; in other cases it shall be necessary." (2 Wagn. Stat. 1020, § 43.) This section received a judicial construction in the case of *Steiber v. Wensel*, 19 Mo. 513, and it was there held that the form of petition adopted in this case was good under the code. The petition in the case of *Steiber v. Wensel* alleged that the defendant spoke, in the German language, of and concerning the plaintiff, Mrs. Steiber, false and slanderous words, naming them, and it contained no other material averments. A demurrer was filed and overruled, and, after verdict for plaintiff, a motion in arrest of judgment was made and also overruled; and on appeal to this court the judgment was affirmed, Judge Gamble delivering the

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Laswell v. The Presbyterian Church of Jefferson City et al.

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opinion. The two cases are precisely parallel, and the decision we regard as conclusive.

In Indiana they have a similar statute, and the court of that State has construed it in the same way. (*Guard v. Risk*, 11 Ind. 156.) Previously to our statutory provision on the subject, the petition would have been undoubtedly bad, as, under the common-law system of pleading, it was necessary to allege that the defendant spoke the words in the presence and hearing of divers persons; and if the words spoken were in a foreign language, it was necessary to aver that the persons present understood them. But according to the construction placed upon the code, these averments are now dispensed with.

Judgment affirmed. Judge Currier concurs; Judge Bliss absent.

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**B. F. LASWELL, Plaintiff in Error, v. THE PRESBYTERIAN CHURCH OF JEFFERSON CITY, MO., M. D. FAULK, AUSTIN A. KING, et al., Defendants in Error.**

1. *Mechanics' lien*—*Failure of claimant to sign affidavit attached to lien, not absolutely necessary under statute—Jurat may be amended.*—The signature of a claimant under the mechanics' lien law, appended to his statement, and the certificate of the clerk of the court that he made oath to the accompanying affidavit, is a substantial compliance with the statute (*Wagn. Stat. 909, § 5*), although the claimant fail to sign the affidavit. And objection being offered to the reading of the lien in evidence at the trial, on account of the absence of such signature, the clerk should be allowed to amend his jurat in this respect.
2. *Mechanics' lien*—*Sub-contractor may file account blending labor and material, after expiration of thirty days.*—In a suit on a mechanics' lien, where the case showed that plaintiff was neither a day-laborer nor a journeyman, but that he did the work and furnished the material under a contract with the original contractor, *held*, that he might file his lien account after the expiration of thirty days, and at any time within four months after the debt accrued, although it blended items for labor done with those for material furnished. Only journeymen and day-laborers would be barred from filing such an account by the lapse of thirty days.
3. *Mechanics' lien*—*Notice need not specify in what specific manner demand accrued.*—Where a mechanics' lien account comprehended labor and material, the claimant will not be confined to his action for labor done because his notice to defendant claimed only for labor, and not for material. (*Wagn. Stat. 911, § 19.*)

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Laswell v. The Presbyterian Church of Jefferson City et al.

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*Error to First District Court.*

*E. L. Edwards & Son*, for plaintiff in error.

I. The thirty days' clause is confined to journeymen and day-laborers. There is no pretense that plaintiff was a day-laborer or a journeyman.

II. The certificate of the clerk meets all the requirements of the law. The law does not require an affidavit to the claim. (*Smith's Ex'rs v. Benton*, 15 Mo. 374; Sess. Acts 1849, § 2.)

III. The Circuit Court should have permitted the clerk to amend his jurat *nunc pro tunc*. (*Bergesch v. Keevil*, 19 Mo. 127; *Budd v. Allen*, 21 Mo. 21.) It was too late to object to the verification of the lien after the case was called for trial. (*Huntington v. Howse*, 22 Mo. 365; *Cornelius et al. v. Grant et al.*, 8 Mo. 64.)

*King & Bro. and Ewing & Smith*, for defendants in error.

I. The Circuit Court did right in excluding this pretended lien. The notice of claim served upon defendants by plaintiff was for work and labor done, and the pretended lien shows the claim to be for work and labor done and materials furnished. The defendants had no notice that plaintiff had a claim for materials. They were entitled to such notice (*Wagn. Stat.* 911, § 19), and might have been very well misled by this one given.

II. The plaintiff having failed to give notice of his claim for materials furnished, he therefore has no lien for materials; and having combined in his account a claim for which he has no lien, with that for which he has a lien (if, in fact, he has a lien for anything), he thereby lost the benefit of the act entirely. (17 Mo. 271.)

III. The fact that the lien is not verified by the oath of the plaintiff, nor by any other person for him, was sufficient to authorize the court to exclude it.

WAGNER, Judge, delivered the opinion of the court.

Faulk made a contract to erect the Presbyterian church in Jefferson City, and employed Laswell to do certain work on the



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Laswell v. The Presbyterian Church of Jefferson City et al.

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same. Laswell filed his lien as a sub-contractor, and attempted to enforce it by legal process; but upon a trial in the Circuit Court, under certain rulings, he took a nonsuit, which failing to have set aside, and the District Court affording him no relief, he now prosecutes his writ of error.

In his notice claiming the lien, after describing the property, he states that his demand is for \$154, which is due him from M. D. Faulk, who was the contractor for the work, and for whom he did the labor and work, and to an amount leaving the balance as stated. In his statement filed for the purpose of acquiring a lien, he sets out the account, and says it was for materials furnished and labor done on the outside and inside of the church, making in all the amount of \$154. He also states that it is a true account of the demand, after all just credits have been given the said Faulk, and all others interested therein, for work and labor done and materials furnished by him, in and upon the Presbyterian church, under a contract with Faulk, the undertaker. The description of the property is set forth, and the statement is signed by Laswell. The certificate of verification appended is as follows:

"B. F. Laswell, being duly sworn, says that the facts set forth in the above statement and the above account are true, to the best of his knowledge and belief.  
C. M. WARD, Clerk."

The defendants objected to the reading of the lien in evidence because the affidavit appended to it was not signed by the plaintiff, or any one for him, and because there was no certificate of the clerk thereto, in due form of law. The plaintiff then asked that the clerk be permitted to attach the proper jurat. The court refused to permit the clerk to amend his certificate, and refused to permit the lien to be read to the jury. To the ruling of the court, exceptions were duly taken.

The statute requires that where a lien is filed it shall be verified by the oath of the person filing it, or by some credible person for him. In this case Laswell signed the statement, but he did not sign the certificate of the clerk as an affidavit separate from the statement. Whilst it is true that in general practice, and by the current of the authorities, an affidavit should be signed by

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*Laswell v. The Presbyterian Church of Jefferson City et al.*

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the party making it, the statute does not in this matter seem to require an affidavit in express terms. It only demands that the statement shall be verified by oath.

Where a defendant, in his answer under the practice act, signed his name at the bottom of his answer, and the magistrate administering the oath appended his statement, that the defendant personally appeared before him and made oath that the facts stated in the answer were true, it was held a substantial compliance with the statute, and that it was not necessary for the defendant to sign the certificate of the magistrate as an affidavit separate from the answer. (*Smith v. Benton*, 15 Mo. 371.) Although the clerk's certificate states that Laswell was duly sworn to the truth and correctness of his statement and account, still it was not made out in the usual form. But that should not have been permitted to work to Laswell's prejudice. He had performed the full measure of his duty in regard to the matter. He took his statement and lien to the clerk to be filed, and that officer swore him as the law directs. If the clerk negligently performed his duty, or made a defective certificate, Laswell should not be made to suffer thereby. To permit such a thing would be to allow the merest technicality to triumph over justice. I am clearly of the opinion that the court erred, and that the clerk should have been allowed to amend his certificate.

Although it was not necessary to the decision of anything saved in this record, it seems that the District Court went further, and adjudged that the plaintiff was not entitled to a lien in this case. As the cause will be remanded, and to save future litigation, I will notice the objection.

The point is raised upon the supposed inaccuracy and the blending of incongruous matters in the account. The account is for materials furnished and work and labor done. It was filed more than thirty days after the demand accrued, but within four months. The fifth section of the law in reference to mechanics' liens provides that "it shall be the duty of every original contractor, within six months, and every journeyman and day-laborer, within thirty days, and of every other person seeking to obtain the benefits of the provisions of this chapter, within four

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Laswell v. The Presbyterian Church of Jefferson City et al.

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months, after the indebtedness shall have accrued, to file with the clerk of the Circuit Court of the proper county a just and true account of the demand due him or them," etc. (2 Wagn. Stat. 909, § 5.) It is only the day-laborer and journeyman that are compelled to file their lien within thirty days, while material-men, sub-contractors and others have four months within which to file the same. The case shows that the plaintiff was neither a day-laborer nor a journeyman, but he explicitly declares that he did the work and furnished the materials under a contract with Faulk, the original contractor. If he contracted to do a certain piece of work, and furnish materials in and about the same, his statement and account for work done and materials furnished according to contract, it seems to me, is sufficient. If the work had been done as a day-laborer or journeyman, and he had blended the items for labor with those for materials, after the lapse of thirty days the lien would have been lost, for they could not have been separated. But this case is not presented in that aspect.

It is also objected that the notice claimed only for work and labor performed, when the lien comprehended materials in addition. But there is obviously nothing in this. All that the law requires to be inserted in the notice is that the person holds a claim against the building or improvements, setting forth the amount and from whom the same was due. (2 Wagn. Stat. 911, § 19.) It is immaterial about particularizing in what specific manner the demand accrued. That fact is determined by inspecting the lien on file.

Wherefore the judgment will be reversed and the cause remanded. Judge Currier concurs ; Judge Bliss absent.

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Woods v. Hilderbrand.

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R. K. WOODS, Plaintiff in Error, v. J. B. HILDERBRAND,  
Defendant in Error.

1. *Conveyances—Alterations in by grantor do not invalidate title.*—An alteration in a conveyance after delivery does not operate to reconvey the title to the original grantor. The title passes by the deed, and its continued existence or integrity is not essential thereto, although a fraudulent and material change may disable the holder from bringing an action upon its covenant.
2. *Mortgages and deeds of trust—Mortgagor continues owner till when.*—The modern doctrine is well established that a mortgage is but the security for the payment of the debt or the discharge of the engagement for which it was originally given; and until the mortgagee enters for breach of the conditions, and in many respects until the final foreclosure of the mortgage, the mortgagor continues the owner of the estate, and has a right to lease, sell, and in every respect to deal with the mortgaged premises as the owner, so long as he is permitted to remain in possession.
3. *Ejectment—Mortgage—Outstanding title.*—A defendant in ejectment can not set up a mortgage with which he is not connected as an outstanding title to the land in controversy, so as to defeat a recovery.

*Error to First District Court.*

*Ewing & Smith*, with *Burke & Howard*, for plaintiff in error.

I. A mortgage until foreclosed, or an entry thereunder for a breach of its conditions, is not such an outstanding title as will bar the right of the recovery of possession in ejectment by the mortgagor against the world. (8 Wend. 616; Kennett v. Plummer, 28 Mo. 142; 4 Kent, 157; 6 Hill, 469; 11 Wend. 535; Chinnery v. Blackman, 3 Doug. 391; 1 Hill. on Mortg. 162, § 15 *et seq.*; Brown v. Snell, 6 Fla. 741; Prescott & Ellingwood, 10 Shepl. 345.)

II. The erasure can not affect the legal title or re-invest the same in any one, or prevent the said sheriff's deed from being read in evidence. (34 Mo. 496; 3 Stark, 60; 8 Cow. 71; 7 Wend. 364; 22 Wend. 393.)

*Lay & Belch*, with *Owens & Wood*, for defendant in error.

I. Any material alteration in a deed, made by the party claiming under it, or with his consent, vitiates the whole deed.

(Blank v. Miller, 18 Barb. 269; 4 Kent's Com. 501, note 1; 9 Wheat. 580; 22 How. 89; 2 Black, 94.) Whilst it is true that cancellation or alteration of a deed executed and delivered does not have the effect to re-invest the title in the grantee, yet the deed itself is void, and the party who altered it can not recover by it. (Williams on Real Est. 400; McCormick v. Fitzsimmons, 29 Mo. 24-34.)

II. The mortgage of Hinkle is such an outstanding title as will defeat the plaintiff's recovery. (See 12 Mo. 613.) The mortgagee is the legal owner, or the legal title is in him, and he may maintain ejectment against the mortgagor: (38 Mo. 120; 10 Mo. 229.) In an action of ejectment under the general issue, the defendant may avail himself of the defense that the plaintiff has not the present right of possession. (38 Mo. 352.) In the case of McCormick v. Fitzsimmons *et al.*, 39 Mo. 34, Judge Wagner, in his opinion, recognizes the doctrine that the title of a mortgagee is such an outstanding title as will defeat a recovery in ejectment.

BLISS, Judge, delivered the opinion of the court.

The plaintiff brings ejectment, and relies upon a sheriff's deed. He purchased at the sale sundry parcels of land, including the one in controversy, and, after receiving the deed, altered, as is claimed by defendant, the description of one of these parcels, but not the one he seeks to recover in this action. This change in the deed the court held to be fatal, and decided that the whole deed was thereby vitiated, and refused to consider it in passing upon the plaintiff's title.

The defendant also was permitted to prove that the plaintiff, after receiving the deed, mortgaged the property to one Hinkle, and that the debt secured by the mortgage was overdue; but Hinkle had not foreclosed or sought to take possession under the mortgage, and defendant does not claim under him. The court, however, held it to be an outstanding title of which the defendant could avail himself in this action.

In both these positions the court committed manifest error. It is a mistake to suppose that an alteration in a deed of convey-



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Woods v. Hilderbrand.

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ance, after delivery, operates to reconvey the title to the original grantor. A total destruction of the instrument will not have that effect, but the title remains in the grantee, and he may bring ejectment upon it. The title passed by the deed; it has performed its office, and its continued existence or integrity is not essential to the title, although a fraudulent and material change may disable the holder from bringing an action upon its covenants. (1 Greenl., § 568; Lewis v. Payne, 8 Cow. 71; Jackson v. Gould, 7 Wend. 364; Herrick v. Malin, 22 Wend. 388; Alexander v. Hickox, 34 Mo. 496.)

Whether a deed thus altered may be used in evidence of the real grant is, perhaps, not well settled. In Withers v. Atkinson, 1 Watts, 236, and in Chesley v. Frost, 1 N. H. 145, it is held that a fraudulent alteration of a conveyance by the grantee, in a material matter, utterly destroys it; and while the title thereby does not re-invest, the deed can not be used by him for any purpose, either to sustain an action upon the covenants or as evidence of his title. But in Doe v. Hirst, 3 Stark, 60, and in Jackson v. Gould, 7 Wend. 364, an altered deed was allowed to be read in evidence to sustain the title created by it. We are not, however, called upon to give an opinion adverse to the doctrine of Withers v. Atkinson, *supra*; for in the case at bar the alteration, so far as the land in controversy is concerned, can not be considered a material one. The plaintiff purchased at sheriff's sale several distinct parcels of land. They were all sold separately, and separate deeds might have been executed. The description of one of the parcels—from what motive does not appear—was changed by the grantee. Without considering what might be the effect of this change as to that parcel, we can not see how it should affect the conveyance as to the others. As to them the alteration was immaterial, and the deed remains in full force, and should have been received as evidence of the plaintiff's title.

The ruling of the court upon the second point contradicts the long and well-settled doctrine as to the relation of the mortgagor and mortgagee before entry or foreclosure. "The modern doctrine is well established, that a mortgage is but a security for the payment of the debt or the discharge of the engagement for

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Woods v. Hilderbrand.

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which it was originally given; and until the mortgagee enters for breach of the conditions, and in many respects until final foreclosure of the mortgage, the mortgagor continues the owner of the estate, and has a right to lease, sell, and in every respect to deal with the mortgaged premises as the owner, so long as he is permitted to remain in possession." (Kennett v. Plummer, 28 Mo. 145.) The case of Meyer v. Campbell, 12 Mo. 603, is relied upon as establishing the doctrine sustained by the court below, and such a position seems to be indicated by the court, though the question is not directly decided. The mortgagee himself, in possession after forfeiture, might doubtless set up his own title against that of the mortgagor (McCormick v. Fitzsimmons, 39 Mo. 34), but, as against all the world besides, the mortgagor is the owner, and his title can not be defeated by showing that the property is pledged to a third person for the payment of a debt. (Hill. on Mortg. 162, § 15; Raynor v. Wilson, 6 Hill, 469; Collins v. Toney, 7 Johns. 278; Jackson v. Pratt, 10 *id.* 387; Den v. Dimon, 5 Halst., N. J., 156.) If it was the intention of the court in Meyer v. Campbell to hold a contrary view, it is not clearly expressed; and with the clear statement of the relation of the mortgagor and mortgagee in Kennett v. Plummer, and the universal holding in other States, we must unhesitatingly hold the doctrine in Missouri as well as elsewhere to be, that a defendant in ejectment can not set up a mortgage with which he is not connected as an outstanding title. The fact that ejectment may be brought in Missouri by the mortgagee, while it will not lie in New York, does not invalidate the New York authorities upon the present question; for only the mortgagee himself may avail himself of his right, and it is of no consequence, so far as strangers are concerned, whether he have only the right to foreclose or the right of ejectment as well.

The judgment of the District and Circuit Courts are reversed and the cause remanded for a new trial. The other judges concur.

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The Mayor, Councilmen and citizens of the City of Boonville v. Trigg.

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THE MAYOR, COUNCILMEN AND CITIZENS OF THE CITY OF BOONVILLE, Plaintiffs in Error, v. WILLIAM H. TRIGG, Defendant in Error.

1. *Constitution—City of Boonville—Amendment of act of incorporation, constitutional.*—That part of section 1 of the act approved February 8, 1839 (Sess. Acts 1838-9, p. 294), incorporating the city of Boonville, which related to its boundaries, was amended by the act of 1868 (Sess. Acts 1868, p. 191), and everything relating to this subject was re-enacted in the amended law, as a substitute for the old one. *Held*, that the act of 1868 was not invalid as being repugnant to section 25, article 4, of the State Constitution, because the whole of section 1 of the act of 1839, as amended, was not embodied and inserted in the amendment.

*Error to First District Court.*

*D. B. McMillan*, for plaintiffs in error.

I. The act of the general assembly entitled "an act amendatory of an act to incorporate the city of Boonville," approved March 23, 1868, is not in conflict with section 25 of article 4 of the constitution of the State of Missouri. (See Constitution.) This section does not require that the act or part of act amended shall be set forth and published as it stood before, but that the act or part of act amended shall be set forth and published as amended. (Cooley on Const. Limit. 151; *People v. Mahaney*, 13 Mich. 481.)

II. The said act of 1868 amends all that part of the act of 1839 relating to the bounds and limits of the city of Boonville, and the part so amended is set forth and published in full.

*Adams, and Draffen & Muir*, for defendant in error.

The attempted amendment of 1868 is in direct conflict with section 25, article 4, Const. Mo. (Gen. Stat. 1865, p. 31.) The amendment strikes out the words constituting the old bounds of the city, and inserts the words constituting the new bounds, without re-enacting the section thus amended as "if it were an original act or provision." This can not be done. The section of the constitution referred to is mandatory, and not merely directory. The object of this provision was to force the Legis-

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•The Mayor, Councilmen and citizens of the City of Boonville v. Trigg.

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lature to so enact amendments that the courts and all others might see at a glance, and without reference to the old law, the new law or amendment in all its bearings. In the present case this can not be done. (People v. Mahaney, 13 Mich. 497; Walker v. Caldwell, 4 La. Ann. 297; Heirs of Duverge v. Salter, 5 La. Ann. 94; Langdon v. Applegate, 5 Ind. 327; Rogers v. State, 6 Ind. 31; 41 Mo. 39; 42 Mo. 590.)

WAGNER, Judge, delivered the opinion of the court.

The only question presented for our consideration in this case involves the constitutionality of the act approved March 23, 1868, amending the charter of the city of Boonville. The city of Boonville was incorporated by an act of the Legislature, approved February 8, 1839, and the first section of the act defined the boundaries of the city, designated its name and style, and conferred upon it certain powers.

By section 1 of the act of 1868 the original act was amended so far as limits and boundaries were concerned. The whole section is not re-enacted or amended, but only so much as relates to boundaries. Everything which is included in the subject of the amendment, however, is given and re-enacted entire as a substitute for the old law. It is contended that because the whole section, as amended, is not embodied and inserted in the amendment, the act is invalid and repugnant to the twenty-fifth section of the fourth article of the constitution of this State. That section provides that "no act shall be revived or re-enacted by mere reference to the title thereof; nor shall any act be amended by providing that designated words thereof shall be struck out, or that designated words shall be struck out and others inserted in lieu thereof; but in every such case the act revived or re-enacted, or the act or part of act amended, shall be set forth and published at length, as if it were an original act or provision."

In this section it will be perceived that different provisions are made. Where an entire act is revived or re-enacted it must be set forth and published in whole. Where a whole act is amended the same course must be pursued; but where a part of an act is amended, the amendatory part only need be set out and published.

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The Mayor, Councilmen and citizens of the City of Boonville v. Trigg. \*

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Every person who is familiar with our past legislative history well understands the reasons which induced the insertion of this constitutional provision. Amendments were made in such a manner as to involve the law to which they pertained in inextricable confusion. Amendatory acts were passed which required only the insertion of certain words, or the substitution of one phrase for another, in sections which were only referred to by their titles, but not published. After the amendments were so framed and clothed in doubt, obscurity and uncertainty, it was almost impossible to arrive at the real and actual intention. It was to obviate these difficulties that the requirement was made that every amendment, either to a whole act or a part of an act, should be set forth and published. Whether the peculiar phraseology of the constitution accomplishes all that was intended is doubtful.

The counsel for the defendant in error have cited cases from Louisiana and Indiana to sustain their position, and contend that according to these adjudications, when an act is revised or section amended, they must be set forth and published at full length in the amendatory or revising act. But the constitutional provision on which these decisions were based differs essentially from ours. The 119th article of the constitution of Louisiana reads as follows: "No law shall be revised or amended by reference to its title, but in such case the act revised or section amended shall be re-enacted and published at length." The twenty-first section of the fourth article of the constitution of Indiana was copied almost literally from the Louisiana constitution. It provides that "no act shall ever be revised or amended by mere reference to its title, but the act revised or section amended shall be set forth and published at full length."

The constitution in these States expressly declares that where a section is amended it shall be re-enacted and published at full length. But our constitution only requires the act or part of act amended to be set forth and published. That was done in this case. There was no striking out, or inserting words in lieu thereof, but there was an amendment of part of the act, and the amendment was set forth and published entire. The constitution was strictly complied with.



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Abbott v. Lindenbower.

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It is greatly to be regretted that our constitution did not adopt the same terms and language that we find used in the States above alluded to. Then the whole matter would always be found in the amended section, and there would be no necessity of hunting through different books and in separate enactments to find what the law was. The Legislature, since the existence of the present constitution, has generally set forth and published at full length a section where it was re-enacted and amended, and wisdom and convenience dictate that that policy should be pursued. But we must construe the law as we find it, and the judgment of the court below holding the act unconstitutional must be reversed. Judge Currier concurs; Judge Bliss absent.

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JOEL ABBOTT, Respondent, *v.* WHEELER B. LINDENBOWER,  
Appellant.

1. *Revenue — Tax sales — Abbot v. Lindenbower, 42 Mo. 162, did not attempt to anticipate all objections to.*—The true spirit and meaning of the decision in Abbott v. Lindenbower, 42 Mo. 162, was simply that certain things were essential to the valid exercise of the taxing power, and could not be dispensed with by the Legislature; and that, in defending against the effect of a tax deed, the want or omission of them might be shown in evidence, notwithstanding the statute (Gen. Stat. 1865, p. 127, §§ 111-12); but that decision did not attempt to specify all the things that were so essential—to anticipate all possible objections to every tax sale.
2. *Revenue — Tax deeds prima facie evidence of title.*—A tax deed is *prima facie* evidence of facts necessary to constitute title, and the *onus* is thrown upon him who would attack its validity.

*Appeal from Third District Court.*

Jas. F. Hardin and H. J. Lindenbower, for appellant.

I. The power of sale does not attach to land for non-payment of taxes until every prerequisite has been complied with. The party claiming under a tax deed has the burden on him to show a substantial compliance with the law through which he claims title. Tax sales are against common justice and right, and a strict construction must be given to all enactments authorizing such sales.

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Abbott v. Lindenbower.

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II. Tax deeds are evidence only of the facts therein recited, and the Legislature has no authority to make such deeds conclusive evidence that each and every matter and thing required to be done by the provisions of such act has been complied with. It will be observed that the deed in the case at bar does not pretend to recite any of the former acts of listing, assessing, levying tax, etc.; yet it is claimed that the deed is conclusive evidence that all these things were done in the proper time and manner. Such doctrine is monstrous.

III. The Circuit Court erred in giving the declarations of law on the part of the plaintiff. (See *Abbott v. Lindenbower*, 42 Mo. 162; *Ruby v. Huntsman*, 32 Mo. 501; *Reed v. Morton*, 9 Mo. 868; *Morton v. Reed*, 1 Mo. 64; *Lachman v. Clark*, 14 Cal. 131; *Eppinger v. Kirby*, 23 Ill. 521; *Dukes v. Rowley*, 24 Ill. 210; *Abell v. Cross*, 14 Iowa, 191; *Lovejoy v. Lunt*, 48 Me. 339; *Crowell v. Goodwin*, 3 Allen, Mass., 535; *Woolfolk v. Fonbene*, 15 La. Ann. 15; *Haman v. Pope*, 1 Gilm., Ill., 131; *Allen v. Armstrong*, 16 Iowa, 508; *Whitney v. Thomas*, 23 N. Y. 281; *Scott v. Y. M. Society*, 1 Doug., Mich., 121; *Doughty v. Pope*, 3 Den. 595, 599; *Beekman v. Bingham*, 1 Seld. 366; *Blackw. Tax Tit.* 78-83; *Curry v. Hinman*, 11 Ill. 428; *Hughey v. Horrell*, 2 Ohio, 378; 3 *Comstock*, 401; 15 *Verm.* 72; 22 *Pick.* 387; *Isaacs v. Wiley*, 12 *Verm.* 677; *Smith v. Bodfish*, 27 *Me.* 295; *Blakeney v. Ferguson*, 3 *Eng.* 277; *Ronkendorff v. Taylor*, 4 *Pet.* 349; *Brown v. Veazie*, 25 *Me.* 362; *Young v. Martin*, 2 *Yates*, 312; *Shearer v. Woodburn*, 10 *Barr*, 511; *Bush v. Davidson*, 16 *Wend.* 554; *Langdon v. Poor*, 20 *Verm.* 15; *Thatcher v. Powell*, 6 *Wheat.* 119; *Gaines v. Stile*, 14 *Pet.* 322; *Judevine v. Jackson*, 18 *Verm.* 472; *Sharp v. Johnson*, 4 *Hill*, 99; *Corwin v. Merrit*, 3 *Barb.*, S. C., 343; *Atkins v. Kinman*, 20 *Wend.* 247; *McDonough v. Gravier*, 9 *La.* 546; *Hawkins v. Kempfe*, 3 *East*, 410; *Sumner v. Sherman*, 13 *Verm.* 612; *Little v. Thurston*, 3 *Mass.* 432; 12 *Verm.* 677; 3 *N. H.* 103.) As to construction of former statutes in this State, see 9 Mo. 868; 14 Mo. 575; 17 Mo. 161; 19 Mo. 331; 21 Mo. 420; 29 Mo. 377; 28 Mo. 62; 32 Mo. 501; 33 Mo. 312, 335.

IV. Section 112, p. 127, Gen. Stat. 1865, so far as it attempts

## Abbott v. Lindenbower.

to make the tax deed evidence of former acts and things, irrespective of whether they were ever performed or transpired, is in direct conflict with article 5 of the amendments to the constitution of the United States, providing that "no person shall be \* \* deprived of life, liberty, or property, without due process of law." (See *Wilkinson v. Leland et al.*, 2 Pet. 627.)

*T. A. Sherwood*, for respondent, relied on *Abbott v. Lindenbower*, 42 Mo. 162.

BLISS, Judge, delivered the opinion of the court.

This cause has been once before the court, and is reported in 42 Mo. 162-9. It was there held that that part of the revenue act under consideration, making the tax deed conclusive evidence that everything required to be done by the provisions of the act had been complied with, was unconstitutional as far as it prohibited the owner of the land from showing that the tax assessment was not made against him by name, and that judgment was rendered without proper notice. The court also intimated that certain other matters and omissions sought to be proved to invalidate the deed might be concluded by it, and it was plainly declared that while the Legislature could not make a deed conclusive evidence of matters vitally essential to the valid exercise of the taxing power, it had power to make a deed of a public officer *prima facie* evidence of title. The positions of the court upon the matters involved were clearly stated in the opinion, and we still unhesitatingly adhere to them.

When the case went back to be again tried, the plaintiff, after having submitted his deed in evidence, offered testimony tending to prove that the land was subject to taxation at the time of the assessment, that the taxes had not been paid, that the land had not been redeemed before the execution of the deed, and that it belonged to and was in possession of J. M. Noland, in whose name it was assessed, and that the notice by publication of the intended application for judgment was properly given. The defendant offered no evidence, and the plaintiff recovered judgment.

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Abbott v. Lindenbower.

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The court made the following declaration of law on behalf of the plaintiff, to-wit: "That a deed executed by the collector under the provisions of the act contained in the session laws of 1863-4, entitled 'an act for the assessment and collection of the revenue in the State of Missouri,' approved February 4, 1864, shall be held and received in all courts and places where the title to the real estate therein conveyed is involved, as conclusive evidence that each and every act and thing required to be done by the provisions of said act had been complied with; and the party offering such deed in evidence shall not be required to produce the judgment, precept, or any other matter or thing, as evidence to sustain the title thereby acquired, although the party controverting such deed, and the title thereby conveyed, may, for the purpose of invalidating and defending against the same, show either one of the following facts only: first, that the land conveyed by such deed was not subject to taxation at the time of the assessment thereof, under which assessment such sale was made; second, that the taxes due thereon had been paid according to law before the sale; third, that such land had been duly redeemed according to law before the execution of such deed; fourth, that the land was not assessed in the name of the owner at the time of the assessment, or some former owner of said land; fifth, that notice was not given of the intended application for judgment against said land at the time and in the manner prescribed by law; and that any other evidence save that enumerated and specified in the five excepted instances aforesaid is wholly incompetent, irrelevant, and inadmissible in all cases where such deed and the title thereby acquired, as to the conclusiveness and validity thereof, is attempted to be controverted or invalidated."

This declaration is in the language of the statute, adding only the four or five exceptions, for the purpose, I suppose, of making it conform to the opinion of the court before referred to. Yet as an abstract proposition of law it can not be correct, and contradicts the spirit of that opinion, which was that certain things are essential to the valid exercise of the taxing power; that the Legislature had no power to dispense with them; that in defending against the effect of a tax deed, the want or omission of the

things which are thus essential may be shown in evidence to invalidate the deed, notwithstanding the statute declares it to be conclusive evidence of their existence. But the court, in that opinion, did not undertake to specify all the things that are so essential; it did not attempt to anticipate all possible objections to every tax sale, and to say what matters would be essential, and hence might be set up as a defense to a deed, and what would be mere matters of form and should be concluded by the deed. It only laid down the general principle, and held that the two objections offered to be sustained upon the trial came within the principle, would have been valid, and should have been allowed. The abstract error of the present declaration is its assumption that there can be no other valid objection to a sale, an assumption which a court can not make; for it will be bound to pass upon each objection specifically as it shall be raised.

Yet notwithstanding this error, it can not of itself invalidate the judgment, for the reason that no objections, formal or essential, were raised to which the declaration could apply. The defendant offered no evidence whatever to show any omission or irregularity in the assessment or sale, and the plaintiff proved more than was necessary in the first instance in order to sustain his purchase. The judgment, then, was so far right, and would have been for the plaintiff had the declaration been less sweeping. The ruling of this court, when the case was formerly before us, neither invalidates the tax deed nor wholly destroys its statutory effect. By admitting certain defenses, notwithstanding the statute, this court held, in effect, that the deed, as to such defenses, should be considered as *prima facie* instead of conclusive evidence of the facts involved in them; and when, upon the second trial, the Circuit Court gave it a more extensive application than could have been intended, and held that all but the enumerated defenses were cut off by the deed, certainly no harm was done unless the defendant was thereby prevented from making a lawful defense. But it seems he made no affirmative objection to the assessment or sale, and it was hence, so far, of no importance to him whether the declaration was right or wrong.

The declarations of law asked by the defendant exhibit, how-



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Abbott v. Lindenbower.

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ever, the real grounds of his defense, and were in substance as follows: 1. "That the tax deed should not be held as conclusive evidence," etc.; "but the party offering it should be required to produce the judgment, precept, and every other matter and thing required to be performed by the provisions of said act," etc. 2. "That the Legislature has no power to make a tax deed conclusive or even *prima facie* evidence that the law had been complied with, but the party relying on a tax deed is required to show that every step preliminary to the sale was had and performed," etc.; that the *onus* of showing that the law has been strictly complied with lies upon the claimant under a sale. 3. The matters are set out in detail claimed to be necessary for the plaintiff to show before he can sustain his sale; and, 4. That the Legislature can not make a deed conclusive or even *prima facie* evidence of anything not recited in it.

These declarations were all refused, as they should have been. They were drawn upon the assumption that the statute under consideration means nothing, or is altogether void. No such limitation upon legislative power has ever been hitherto assumed, and while this court has been careful to guard the rights of property under the constitution, it has also recognized as well the power of the Legislature to enforce the collection of its revenue by suitable penalties and forfeitures, and to throw the *onus* upon him who would attack the validity of an official act. We have sustained the Legislature in providing that a sheriff's deed shall be evidence of facts recited (Wagn. Stat. 612, § 54; McCormick v. Fitsmorris, 39 Mo. 24), and that in certain cases certified tax bills shall be evidence of facts necessary to be established in a suit (City of St. Louis v. Oeters, 31 Mo. 456); and no good reason is seen why it may not also provide that a tax deed shall be received as evidence of certain facts pertaining to the assessment of the tax and sale of the property. No one is injured if the person resisting the effect of the deed is permitted, as to all essentials, to rebut the presumption arising from its delivery.

Counsel insist that we should require the same amount of evidence to sustain the sale as if there were no statutory provision concerning the effect of the deed, and pronounce tax sales to

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Woods v. McCoy et al.

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be against common justice and right, and unworthy of favor. It is against common justice and right for a portion of the people to shirk the payment of taxes, and thus throw an additional burden upon the better disposed; and courts should give effect to all just legislative provisions for the subjection of all property to an equal burden.

In the case at bar the plaintiff offered his deed in evidence, and proved affirmatively, what he was not bound to do, certain facts, the contrary of which the defendant had a right to establish. The defendant offered no evidence whatever, and the plaintiff was entitled to the judgment he obtained, which is affirmed. The other judges concur.

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ROBERT K. WOODS, Plaintiff in Error, v. CATHERINE MCCOY  
AND W. W. MCCOY, Defendants in Error.

1. Woods v. Hilderbrand, *ante*, p. 284, affirmed.

*Error to First District Court.*

*Ewing & Smith*, with *Burke & Howard*, for plaintiff in error.

*Gordon, Owens & Wood*, for defendants in error.

BLISS, Judge, delivered the opinion of the court.

This is a counterpart to Woods v. Hilderbrand, *ante*, p. 284, and the same questions are involved.

Judgment reversed and cause remanded. The other judges concur.

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Ritchie v. Kinney.

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WM. G. RITCHIE, Defendant in Error, v. JOSEPH KINNEY,  
Plaintiff in Error.

1. *Partnership—Purchase with joint capital, interest secured by.*—Parties combining their capital in building a boat thereby acquire a joint property in it, and no bill of sale or formal delivery is requisite to vest such interest as between the parties.
2. *Evidence—Bank-books.*—A synoptical exhibit of the contents of bank-books is not the best evidence. The books themselves must be produced or their absence accounted for.

*Error to First District Court.*

*Draffen, Hutchinson & Muir*, for defendant in error.

*W. Adams*, for plaintiff in error.

CURRIER, Judge, delivered the opinion of the court.

This is a chancery proceeding for the adjustment of partnership accounts and dealings between the parties, growing out of their relations as alleged joint owners of the steamboat Cora. The answer denies the alleged joint ownership, and that is the first question for consideration.

1. In the spring and summer of 1864, as the case shows, the steamboat in question was built in Cincinnati, under the supervision of the defendant. In the progress of the work, negotiations were had between the parties looking to a combination of capital in prosecuting the enterprise. These negotiations resulted in an arrangement by which the plaintiff and his then partner advanced to the defendant the sum of \$2000 for investment in the boat. The defendant received and receipted for the money for that purpose, as his receipt read in evidence clearly shows. There is no dispute about these facts, and it is apparent from the case that the money was in fact invested in the boat enterprise. It appears also that the defendant recognized the plaintiff's interest in the boat after its completion, and after it had been in service long enough to make very considerable profits. From all the evidence bearing upon this issue it satisfactorily appears that the plaintiff was interested in the boat, and a joint owner of it in conjunction with the defendant. Various technical

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Ritchie v. Kinney.

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objections were made to the form and manner in which the plaintiff acquired his interest. They are not tenable. No bill of sale or formal delivery was requisite. The parties combined their capital in building the boat, and thereby acquired a joint property in it. (Abb. on Ship. 1, 7th Am. ed.) And it is to be observed that the controversy here is between the original parties to the transaction, not between the plaintiff and a subsequent purchaser or creditor. (See 1 Greenl. Ev., § 261, 11th ed.) The cases cited in the defendant's brief, as 1 Kern. 35, and 20 N. Y. 495, are inapplicable to the facts developed upon this record.

2. A number of questions arise upon the accounting. The boat was ultimately sunk and became a total loss. The petition avers, and the averment is not denied, that she was insured at the time for \$20,000, and that \$16,000 of the insurance money was collected by the defendant. The defendant admits the collection but denies his accountability, and upon the assumed ground that the insurance was taken out upon his interest (he claiming to be the sole owner) and "in his own name," and not for account of whom it might concern. If the facts assumed appeared in the record, the legal questions arising thereon would deserve careful consideration. But the record discloses no such facts. Nothing of the kind is averred in the pleadings. The insurance papers were not given in evidence, and there was no proof of their contents beyond the fact of the amounts insured. In the absence of evidence, no presumption arises that the insurance was alone in the name of one of the owners, or that it was not in the names of both, or on account of whom it might concern. The circumstance that the defendant was the sole manager of the boat and its affairs proves nothing on this point. The state of the pleadings and proofs indicates that this line of defense was an afterthought. In my opinion, the insurance money was properly included in the account.

3. In order to show the receipts and disbursements on account of the boat, the defendant offered in evidence a memorandum or condensed statement made up from the books of the St. Louis National Bank, showing aggregates of deposits with that institution, and of the amounts checked out. The defendant testified that all the receipts of the boat, after she commenced running,

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Ritchie v. Kinney.

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went into that account, as also all disbursements; that he had "examined the account as contained in the books of the bank, and procured a synopsis of the same," which he presented. The "synopsis" and explanatory statement were objected to and excluded.

The "synopsis" was not the best evidence of the facts proposed to be proved by it, and it was properly excluded. The books themselves should have been produced, as furnishing the best evidence of their contents, and as showing the transactions entered in them fully and in detail. A mere synoptical exhibit of the contents of the books is not a very satisfactory mode of stating an important account which run through many months and involved eighty odd thousand dollars.

4. The account stated by the court, however, needs correction in two particulars. Otherwise it appears to be fair and just. (a) The court states the cost of the boat at \$22,500, apparently upon the ground that the plaintiff admitted that to have been its cost. The admission is good as far as it goes, but it has no tendency to show that the boat did not cost much more than the sum named. The defendant was the only witness who pretended to have any actual knowledge of the cost of the boat. He was fully informed on that subject, and had every means of knowledge. He swears positively that the cost of construction was \$35,600 cash, and reiterates the statement, and is not contradicted. As he is the only witness having definite information in relation to the matter, and as he stands unimpeached, his testimony must be taken as establishing the fact asserted. The account, as stated by the court, must therefore be modified by substituting in place of the \$22,500 the sum of \$35,600 as expressing the true amount expended in the construction of the boat. (b) The court finds that only \$2000 was paid by the defendant to the plaintiff on account of the latter's interest in the boat. The plaintiff's witness, Brewster, testifies that \$2500 was paid on that account, and there is nothing to countervail that statement. Brewster, as clerk of the boat, and upon the defendant's order, paid the money to the plaintiff, and was therefore in a position to know and state correctly the amount paid.



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Mathews v. Switzler.

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The judgment will be reversed and the cause remanded, with directions to the Circuit Court to enter judgment for the plaintiff for the ultimate balance due him upon the account, after crediting the defendant with the additional sum of \$13,100 on account of the cost of building the boat, making the total cost \$35,600, and also crediting him the additional sum of \$500 for money paid the plaintiff on account of the latter's interest in the boat, making the whole amount paid him on that account \$2500. The other items of the account will remain undisturbed, the interest being computed upon the reduced balance. Judge Wagner concurs; Judge Bliss absent.

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MILTON S. MATHEWS, Appellant, v. WILLIAM F. SWITZLER,  
Respondent.

1. *Bills and notes maturing at different times—Deed of trust to secure, may be applied to notes last falling due, when surety.*—The holder of different notes secured by deed of trust may apply the entire proceeds of sale under the deed to the payment of those last maturing, and will not be prevented thereby, either in law or equity, from obtaining judgment against a surety on the note first falling due.

*Appeal from First District Court.*

*O. Guilar*, for appellant.

I. The note sued on is not entitled to be paid first out of the proceeds of the sale of the trust property, to the entire exclusion of the other two.

II. Defendant does not stand in the same relation to the deed of trust as the plaintiff. The deed was made to secure the plaintiff, and not to secure the defendant. True, an indorser has the right to avail himself of the benefit of all the securities held by the creditor for the payment of the debt, but not until he pays the debt. Plaintiff could have sued the defendant on the note before resorting to the deed of trust, and defendant could not have prevented his recovery. Plaintiff has the right to avail him-

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Mathews v. Switzler.

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self of the benefit of all his securities until his entire debt is paid. (*Crump et al. v. McMurtry*, 8 Mo. 408; *Kyner v. Kyner*, 6 Watts, 221; *Union Bank v. Edwards*, 1 Gill & Johns. 346; 5 Sneed, 86.)

*Prewitt*, for respondent.

I. The mortgage was made by the principal debtor for the purpose of paying first the note on which Switzler was surety. (*Mitchell v. Ladew*, 36 Mo. 526; *Thompson v. Field*, 38 Mo. 320.) The deed is conditioned that if the notes are promptly paid as they respectively mature, it shall be void; but if not paid as they mature, "the trustee shall sell and pay first the expenses of the trust, and next whatever may be due and unpaid on said notes." The trustee could have sold as soon as the first note was due, and must, of course, have paid that note first.

II. The principal debtor having made the mortgage to secure first the debt for which respondent was surety, the plaintiff can not misapply the proceeds of the sale to his injury. If plaintiff had sued Switzler without resorting to the mortgage, he would, on paying the debt, have had the right to be subrogated, and to have his money reimbursed to him first out of the mortgaged property. (2 Am. Lead. Cas. 345-50; 1 Lead. Cas. in Eq. 137, 144, 150; 3 Lead. Cas. in Eq. 541, 552.)

CURRIER, Judge, delivered the opinion of the court.

The plaintiff held three notes against a third party, maturing at successive periods, which were secured by a deed of trust upon real estate. After the notes had all matured, a sale was had under the deed, and the entire net proceeds of the property sold were applied upon the notes last maturing, nothing being applied upon the first. The defendant was surety upon the last mentioned note, and this suit is brought to recover from him the sum due upon it.

The defendant's answer alleges, in substance, that the note sued on has been satisfied and paid from the proceeds of the deed of trust sale. The ground assumed is that the law will apply the proceeds realized from a mortgage or deed of trust to the extin-

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Mathews v. Switzler.

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guishment of the note or debt secured thereby which first matures, and in the order of their maturity. *Mitchell v. Ladew*, 36 Mo. 526, and the case following that decision, are cited and relied upon as establishing the doctrine contended for. The authorities cited do not necessarily determine the question presented for decision in the case at bar. *Mitchell v. Ladew* was a suit between contending creditors or parties holding different notes secured by the same deed of trust—not between the original creditor on the one hand and the debtors on the other. It was there held that, as between the creditors or holders of the different notes, the proceeds of the deed of trust should be applied to the payment of the notes in the order of their maturity. <sup>^</sup> But that is not this case. The substantial question here is: shall the original creditor, who holds all the notes, have the full benefit of all the securities which he took for his own protection? He was not satisfied with the security of the deed of trust, and therefore required an additional name upon one of the notes. He testified, and without objection, that he intended the additional name as a security additional to that of the deed of trust, and the transaction upon its face suggests as much. In the meantime he has surrendered no security, and done nothing to prejudice the right of the surety upon the note. And since his debt is not paid, he now calls upon the surety to make good the unpaid balance to the extent of the sum called for upon the face of the note sued on. The principle declared in *Mitchell v. Ladew* we do not consider as in the way of a recovery.

It is urged, however, that if the defendant had paid the surety note prior to the deed of trust sale, he would have had the right to be subrogated, and to have his money reimbursed to him first out of the mortgaged property. The idea seems to be that, in the condition of things supposed, the defendant would have occupied the position of an independent holder of the note first maturing. The doctrine of subrogation or substitution has no application to the case. The creditor has not been paid, and, until he is either paid or secured, the surety has no right to be substituted in his place. The right of substitution is founded upon considerations of an equitable character, and does not of

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Fisher v. Pacific Railroad.

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necessity rest upon the relations or privities of the contracting parties. (Kyner v. Kynér, 6 Watts, 221; Union Bank v. Edwards, Gill & Johns., Md., 346; and see Crump v. McMurtry, 8 Mo. 408.)

On the trial of the case in the Circuit Court, the law was declared to be that the plaintiff could recover nothing upon the note in suit, if it appeared from the evidence that the plaintiff had received from the net proceeds of the deed of trust a sum sufficient to pay it, principal and interest. We do not regard that as a correct statement of the law of the case. It was clearly the right of the plaintiff to have sued upon the note at once upon its maturity, and to have collected the whole of it from the defendant. Had he done so the defendant would have had no legal grounds of complaint. It would have been the mere assertion of the plaintiff's legal rights. He has forfeited no rights, legal or equitable, by pursuing a course more forbearing and indulgent.

The judgment will be reversed and the cause remanded. The other judges concur.

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**BENJAMIN F. FISHER, Defendant in Error, v. PACIFIC RAILROAD, Plaintiff in Error.**

1. *Practice, civil — Supreme Court, objections raised in for first time come too late — Account — Justice's court.*—Where a transcript from a justice's court stated that plaintiff filed an account in the case, and judgment on the appeal trial in the Circuit Court found that plaintiff had sustained damages as alleged in his complaint, and the objection that plaintiff failed to file his account was raised for the first time in this court, the objection comes too late.

*Error to First District Court.*

*Ewing & Smith*, for plaintiff in error.

*Lay & Belch*, for defendant in error.

WAGNER, Judge, delivered the opinion of the court.

The District Court dismissed the appeal in this case, leaving the judgment of the Circuit Court in full force, because the

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Workman v. Campbell.

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record was defective. The action was originally instituted before a justice of the peace, where the plaintiff had judgment, and on an appeal to the Circuit Court judgment was again rendered in his favor.

The only point now urged for a reversal is that the record shows no cause of action. The account or complaint which should have been filed with the justice does not appear in the transcript. The transcript from the justice's court states that the plaintiff filed an account and petition for \$95 as the foundation of his action; the defendant appeared, went to trial before a jury, and appealed from the verdict and judgment to the Circuit Court, where a new trial was had, and the judgment of the Circuit Court expressly states that the court found that the plaintiff had sustained damages as alleged in his complaint. No motion to dismiss, or in arrest of judgment, was made in either of the inferior courts, because the complaint or account was not filed before the magistrate, and the objection is now raised here for the first time. There was a motion for a new trial in the Circuit Court, but the point now relied on was not mentioned as one of the reasons for that motion. The presumption is in favor of the regularity of the proceeding below, and the objection comes too late. It can not be raised here for the first time.

The District Court should have affirmed the judgment instead of dismissing the appeal, but as its action leads to the same result, the judgment will be affirmed.

Judge Currier concurs; Judge Bliss absent.

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SAMUEL WORKMAN, Plaintiff in Error, v. C. C. CAMPBELL,  
Defendant in Error.

1. *Practice, civil—Petition—Requirement that instrument of writing be filed with, does not include subscription papers.*—A certain subscription paper, signed by above forty subscribers, was made the foundation of an action against one of them to compel payment of his subscription. *Held*, that the statute requiring the filing of instruments of writing in certain cases with the petition (Wagn. Stat. 1022, § 51) was never intended to include such cases. It was not meant to include articles of association and subscriptions.



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 Workman v. Campbell.
 

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2. *Contracts—Subscription—Labor and expense sufficient consideration for.*—Labor performed and money spent to secure the location of a railroad depot are sufficient consideration to support a promise contained in subscription to pay money for that object.
3. *Contracts—Consideration, legality of—Depot, location of—Railroad company.*—A contract to pay a given sum of money to one who should present a petition or proposition to the directors of a railroad company for the location of the depot on certain land, the money to be paid on location of the depot and completion of the road, is not void as against public policy unless it appear that sinister, extraneous, or corrupting influences were brought to bear on the company to superinduce the location. ■

### *Error to First District Court*

*Crillenden & Cockerell, and Ewing & Smith, for plaintiff in error.*

I. The Circuit Court erred in sustaining the demurrer, because the writing sued upon has the force and effect of a promissory note and imports a consideration. (Caples v. Branham, 20 Mo. 244; 18 Mo. 513; 2 Am. Lead. Cas. 162; 4 N. H. 534; 20 Johns. 89; 1 Metc. 570; 2 Denio, 403.)

II. This contract is not, upon its face, against public policy, and therefore void. If the money subscribed was not used, or to be used, to improperly influence the company or its officers to locate a depot, then the consideration is good, and the subscription was not against public policy. (Pierce on Railw. 70, 71; 9 Watts, 458; 12 Wis. 512; 6 Ohio St. 119; 15 Ohio St. 225, 320; 16 B. Monr. 358, 364; 15 B. Monr. 218.)

*Phillips, for defendant in error.*

I. The supposed agreement is without consideration, so far as the defendant is concerned. He was to receive no benefit whatever from the location of the depot. There was no mutuality of obligation, for neither the plaintiff nor Pigg were bound to do anything at the time of making the subscription. It was therefore *nudum pactum*. (Chit. on Cont. 15.) There was no privity between the plaintiff and the defendant. Workman was a mere volunteer. It is not denied that a promise originally bad for want of a consideration may afterward become binding on the promisor by the promisee advancing money or incurring labor and

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Workman v. Campbell.

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expense, in good faith, on the strength of such promise. There is no sufficient averment in the petition to indicate that plaintiff did what he alleges on the faith of the subscription. (Warren v. Stearns, 14 Mass. 80.) And even did the petition contain such averment it would not support an action founded on the subscription or original promise, but the action should be founded on the implied promise growing out of such subsequent performance of work or expenditure of money. (14 Mass. 175; 19 Pick. 78-9.)

II. The directors chosen by the stockholders were clothed with a public trust and charged with the duty of locating the road and establishing depots, solely as by law required, and with regard to the public convenience and general good. The offer of means, therefore, to the directors to influence their decision, or bias or coerce their judgment, in favor of a private enterprise, was corrupting in its tendency, and contrary to open, upright, and fair dealing. The petition bears upon its face the unmistakable impress of corruption, and the courts have seldom failed to so pronounce. (Fuller v. Dame, 18 Pick. 472, 479-81; Armstrong v. Toler, 11 Wheat. 258; McGhee v. Lindsay, 6 Ala. 16; Davidson v. Seymour, 1 Bosw. 89; Bank of United States v. Owens, 2 Pet. 540; 541; 21 Barb. 361, 374; Pacific R.R. v. Seely *et al.*, 45 Mo. 212.)

III. The subscription paper which is the predicate of the action is not filed with the action, nor is its absence accounted for. (R. C. 1855, p. 1240, §§ 59, 60; Rothwell v. Morgan, 37 Mo. 107-8.)

WAGNER, Judge, delivered the opinion of the court.

Plaintiff brought his action in the Johnson County Circuit Court to recover the sum of \$200, together with interest, on a subscription made by the defendant. The petition, in substance, sets out that by the subscription paper the defendant, with others, bound himself to pay the amount subscribed to John A. Pigg, Jr., or whoever might present a petition or proposition to the board of directors of the Pacific railroad, to be used in securing the location of a depot on the land then owned by Samuel Workman or James McKehan; the money to be paid whenever it was ascertained that the location was made and the road finished to

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Workman v. Campbell.

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the depot; that the land mentioned in the agreement, upon which the depot was to be located, was adjoining the town of Knobnoster; and that, in consideration of the subscription, plaintiff did present to the board of directors a petition and proposition for the location of the depot upon the lands mentioned in the subscription paper, and that he expended a large amount of labor and money, to-wit: one thousand dollars, in order to secure the location of the depot, and did secure thereby the location; that the railroad was, on the 2d day of May, 1864, completed to the said depot, and has ever since been in use to and from the same, of which the defendant was duly notified, and that Pigg assigned the subscription to plaintiff.

To this petition a demurrer was filed, for the reasons: first, that there was no sufficient consideration stated to support the promise alleged to have been made by the defendant; second, because it was a promise to pay money for influencing public officers, whose duty it was to select a depot with reference to the public convenience and accommodation; third, because the agreement was against public policy; and fourth, because it was an agreement for the exertion of a secret influence and power over the affairs of the corporation, not generally known to the public.

The Circuit Court gave judgment sustaining the demurrer, and this judgment was affirmed by the District Court. The decision in the District Court was based upon a ground not raised by the demurrer, and was placed solely on the fact that the suit was brought upon a written agreement charged to have been executed by the defendant, and that the petition did not show that the written instrument was filed in the suit. In this ruling I think the court committed error.

It is indeed true that the statute provides that when any petition or other pleading shall be founded upon any instrument of writing, charged to have been executed by the other party, or his testator or intestate, or other person represented by such party, and not therein alleged to be lost or destroyed, the same shall be filed with such petition or other pleading. (2 Wagn. Stat. 1022, § 51.) If the plaintiff fails to make proffert of the instrument

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Workman v. Campbell.

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of writing mentioned in his declaration, and which is the foundation of his action, it is a substantial defect and may be reached by demurrer. (*McCormick v. Kenyon*, 13 Mo. 131; *Campbell v. Wolf*, 33 Mo. 459; *Dyer v. Murdock*, 38 Mo. 224; *Carr v. Waldron*, 44 Mo. 393.) But the provision of the statute must have a reasonable construction, and not be perverted so as to produce injustice, or be made to apply to cases which were never intended to be comprehended within it.

In *The N. R. & P. Plank Road Co. v. Robinson*, 27 Mo. 396, it was held that the act regulating proceedings in justices' courts did not, in a suit to recover the balance alleged to be due on a subscription to the capital stock of a plank road company, require the filing of the original articles of association executed by the defendant and others for the purpose of organizing the company. The reasoning in that case applies with full force to this. Now the subscription paper here, by which the liability of the defendant was incurred, contains the names of more than forty persons as co-subscribers; and if this paper must be filed in a suit against any delinquent, and remain with the court during the pendency of the litigation, then but one suit can be prosecuted at the same time, and that one might be so long in court that an action against other delinquent subscribers would be barred by the statute of limitations. The subscribers may reside in different counties, and to require the instrument to be filed in every suit would practically amount to a denial of the process of the law to enforce collection. The statute was obviously never intended to include cases of this kind, or to reach articles of association or subscriptions.

The first point assigned in the demurrer is that there was no sufficient consideration stated to support the promise. Where notes or promises are made by way of voluntary subscription, to raise a fund to promote an object, these notes or promises are open to the defense of a want of consideration, unless the payee or promisee has expended money or entered into engagements which, by a legal necessity, must cause loss or injury if payment is not made to him. (1 Pars. on Notes and Bills, 202.)

Incurring expense and assuming liabilities by the promisee, in consequence of the promise, is always a sufficient consideration;

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Workman v. Campbell.

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and prejudice, expense, and charge to the promisee is sufficient to constitute a valuable consideration for a promise. (*Koch v. Lay*, 38 Mo. 147, and authorities cited.)

Where the defendant, with others, subscribed a writing by which, in consideration that a railroad company would construct a depot, etc., for the accommodation of travelers, at B., he agreed to pay the company \$50 for the purpose of aiding in making the depot and establishing and improving public roads to and from the same, it was held that the instrument imported a request to the company to construct the buildings and establish and improve the roads, and that a compliance with the request by the company, so far as to construct the depot, was a sufficient consideration for the defendant's undertaking. (*Kennedy v. Colton*, 28 Barb. 59; see also *Barnes v. Perine*, 2 Kern. 18.)

The averment in the petition is that in consideration of the promise and undertaking of the subscribers, the plaintiff performed labor, incurred expense, and laid out a sum of money to secure the object contemplated, and actually succeeded in accomplishing it. There can be no question about the sufficiency of the consideration. The remaining question is, was the contract void, as being in itself illegal or against public policy?

In the case of *The Pacific R.R. Co. v. Seely et al.*, 45 Mo. 212, we decided that although a railroad company was in one sense a private corporation, yet its chartered privileges were still granted to subserve great public interests, and that it was the duty of the directors and members of the company to exercise their best and unbiased judgment upon the question of fitness in locating depots, without being influenced by distinct and extraneous interests having no connection with the accommodation of the public or the interests of the company. The company have a deep interest in these transactions, and the directors and members of a corporation will not be permitted to reap a private gain or benefit at the expense of the public convenience, and to the detriment of the community.

But there is nothing set out in the amended petition on which this case was tried, to show that any sinister, extraneous, or corrupting influences were brought to bear upon the company to



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McClure v. Wells; Adm'x, et al.

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superinduce the location. It is not alleged that anything was directly paid to the directors, or that they obtained any private advantage in consequence of their action. If such were the facts, as they do not appear on the face of the petition, the objection should have been taken by answer, and the proof submitted upon the trial. How and in what manner the labor and money were expended to secure the location does not appear. If parties voluntarily combine, in furtherance of a great public enterprise, to assist a company in the erection of a depot, I can see no objection to it, if it is done honestly and in good faith.

There is nothing to show that the arrangement was either wrongful or corrupt, and the court, in arriving at that conclusion, indulged in a presumption. I think the presumption is not warranted. The judgment should be reversed and the cause remanded, with directions to the court below to overrule the demurrer and permit the defendant to file his answer. Judge Currier concurs; Judge Bliss absent.

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FRANCIS A. MCCLURE, Plaintiff in Error, *v.* VIRGINIA E. WELLS, ADMINISTRATRIX, ETC., AND R. H. WALKER, Defendants in Error.

1. *Sheriff—Return made in name of deputy insufficient—May be amended after judgment, when.*—A return of process signed "John Butler, deputy sheriff," is insufficient to give the Circuit Court jurisdiction of the person of defendant. But it may be amended in aid of judgment, on reversal of the cause, so as to make the return in the name of the principal sheriff; and it makes no difference that at the time of amending his return the sheriff was out of office.

*Error to Third District Court.*

*Phelps*, for plaintiff in error.

The Circuit Court, after an appeal from the decision overruling the motion to set aside the judgment, acted properly in permitting the sheriff to amend his return. The cause decided at September term, 1866, was not before the court.

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McClure v. Wells, Adm'r, et al.

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*T. A. Sherwood*, for defendants in error.

I. The service upon Walker, being by the deputy sheriff in his own name, was absolutely void, and the Circuit Court acquired no jurisdiction over him, and should have set aside the judgment on his motion. (*Harriman et al. v. The State*, 1 Mo. 504; 8 Bac. Abr. 671, tit. Sheriff.)

II. The return of the sheriff on the summons was matter of record, and no motion for new trial or exception was necessary in order to the examination of the sufficiency of that return, or of the error committed in refusing to set aside the judgment based thereon. (*Cabene v. Douglas*, 1 Mo. 336; *Walsh v. Agnew*, 12 Mo. 520; *West v. Miles*, 9 Mo. 167; *Bateson v. Clark*, 37 Mo. 31; *Nordmanser v. Hitchcock*, 40 Mo. 178; *id.* 602; *Hann. & St. Jo. R.R. Co.*, 42 Mo. 467; *Peyton v. Rose*, 41 Mo. 257; *Jones v. Fuller*, 38 Mo. 363; *State v. Matson*, *id.* 489.)

III. It was not competent for the sheriff to make an amendment to the return of his deputy: first, because the record shows that he had never performed the service (*McKnight v. Connell*, 14 La. 396); second, because the case, as now presented, was then pending in the District Court. (*Ladd v. Cousins*, 35 Mo. 513; *Stewart v. Stringer*, 41 Mo. 400.)

CURRIER, Judge, delivered the opinion of the court.

This is a proceeding by motion to set aside a judgment by default. The judgment sought to be set aside was rendered by the Cedar County Circuit Court at its September term, 1866. At the succeeding March term, Walker, one of the defendants, moved the court to set the judgment aside, basing the motion upon the assumed ground that the court rendering it had no jurisdiction of his person. The motion was overruled, and Walker excepted. A bill of exceptions was subsequently filed, and an appeal taken to the Third District Court.

What the District Court did with the motion and the judgment of the Circuit Court upon it, does not distinctly appear. The whole record is distressingly involved, confused, and repetitious. While it contains a mass of irrelevant matter, it fails to show

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McClure v. Wells, Adm'x, et al.

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whether the District Court either affirmed or reversed the judgment which was appealed from. In fact, that judgment seems to have escaped the notice of the court. No allusion is made to it in the opinion filed in the cause. The opinion seems to treat the case as though the appeal had been taken from the original judgment. That judgment is referred to, and the antecedent proceedings declared insufficient to sustain it; and that seems to be the judgment which the court undertook to reverse. As already remarked, no reference is made to Walker's motion to set aside, or to the subsequent proceedings of the Circuit Court upon that motion.

The District Court held that the original judgment was unwarranted, upon the ground that the return of service of process upon Walker was not properly authenticated. The defect of the return, as the District Court declares, consists in this: that it was signed by "John Butler, deputy sheriff," and not by or in the name of the principal sheriff. But where did the court get that fact? It does not appear in the bill of exceptions. The bill of exceptions purports to contain a copy of the original judgment and a mass of other matter, but wholly omits the original summons, as also the return upon it. If the merit of the motion is to be determined from the facts exhibited in the bill of exceptions, then there is nothing to show that the court committed any error in overruling it. In order to find error it is necessary to go outside of the bill of exceptions for its discovery. Unless the appeal from the adverse judgment of the court upon Walker's motion had the effect of a writ of error to bring up the entire record, regardless of what the bill of exceptions contained, the summons and return were not in the case, and there was nothing for the District Court to base its judgment upon. We are not prepared to say that the appeal had the effect sought to be attributed to it. However that may be, it was clearly the duty of the District Court to have acted directly upon the judgment appealed from, and to have either affirmed or reversed it. That was not done. The evidence of the record is that the court left that judgment untouched, and that it proceeded at once to reverse the prior judgment, which was never appealed from.

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Patton, Ex'r, and Smith et al., heirs of Hanna, v. Hanna.

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In order to clear the case of its obscurities and leave it in a position to be acted upon intelligibly in the Circuit Court, the judgment of the District Court will be reversed, as also that of the Circuit Court overruling Walker's motion, and the cause remanded to the latter court, to be proceeded with in the same manner as though the pending motion had never been acted upon. Leave should be granted to amend the return in accordance with the facts. Such amendments are always freely allowed in aid of a judgment, although denied where their effect is to create error. It makes no difference that the sheriff is out of office. (Stewart v. Stringer, 45 Mp. 113; Scruggs v. Scruggs, *ante*, p. 272.) If the return is amended so as to obviate the objection urged against it, the motion to set aside the original judgment should be overruled; otherwise (if the objectionable fact exists) the motion must be sustained. Judge Wagner concurs; Judge Bliss absent.

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N. H. PATTON, EXECUTOR, AND WM. F. SMITH *et al.*, HEIRS OF  
ANDREW HANNA, Appellants, v. JOHN F. HANNA, Respondent.

1. *Partition, amicable*—*Utmost fairness should be exercised*—*Sale set aside, for what*.—In amicable proceedings in partition, the utmost fairness and good faith should be observed; and if, from accident, mistake, or any cause, the parties interested have been prevented from looking after their interests, and the property has been sacrificed, a sound exercise of judicial discretion would demand that the sale be set aside.
2. *Partition*—*Return need not be made to a specified term*.—In sales in partition, the sheriff is not compelled, as in sales *in invitum*, to sell and make return at a specified term. "The same regulations prescribed" as for sales upon executions (§ 81, partition act) must refer rather to the advertisement and manner of sale than to the time when the sale shall be made and returned.
3. *Partition*—*Order for sale should direct at term of what court sale should be made*.—The failure of the court, in its order of sale in partition, to direct whether the sale should be had at a term of the Circuit or County Court (§ 63, partition act) would not vitiate the title under the sale, but the order should be amended to conform to the act.

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Patton, Ex'r, and Smith et al., heirs of Hanna, v. Hanna.

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*Appeal from Fourth District Court.*

*Prewitt, Barrow & Porter*, for appellants.

I. The order of sale was insufficient because it was not made returnable to the next term of the Circuit Court. (See Wagn. Stat. 970, §§ 31, 32; *id.* 602, § 4.)

II. The order is insufficient because it does not state whether the sale shall be made at a term of the Circuit Court or at a term of the County Court. (Wagn. Stat. 975, § 63.)

III. The statute can not be construed to authorize a sale at the same term at which the order is made.

*Hall*, for respondent.

BLISS, Judge, delivered the opinion of the court.

The heirs of Andrew Hanna presented to the Randolph Circuit Court their petition for partition of about eighty acres of land; and obtained an order of sale under section 59 of the partition act. The order was issued and the sale made at the same term, and at the next term a portion of the petitioners moved to set aside the sale, claiming it to have been irregular, inasmuch as it was made at an adjournment of the same term wherein the order was made, and without the knowledge of any of the parties except John F. Hanna, who bid off the property; also, that it was sold for much less than its value, and for less than half the amount it would have brought had the parties been advised of it; that fraudulent contrivances were resorted to, to keep those interested from knowing of the sale, and to keep those present from bidding; that legal notice was not given, etc. The motion was overruled, and the matter comes up by appeal.

This was not an adversary proceeding; no dispute arose in relation to title, and the shares of each party were ascertained without controversy. One attorney acted originally for all. In these proceedings the utmost fairness and good faith should be observed, and if, from accident, mistake, or any cause, the parties interested have been prevented from looking after their interest, and the property has been sacrificed, a sound exercise of



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Patton, Ex'r, and Smith et al., heirs of Hanna, v. Hanna.

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judicial discretion would demand that the sale be set aside. I see no sufficient evidence in this case of actual fraud, but it was clearly shown that none of the parties except the purchaser knew of the sale; that some of them were prepared to give more than double the amount for which it was sold; that the attorney who filed the petition lived in another county, as did some of the petitioners, and, in consenting to the issuing of the order by the clerk, stipulated that he should be advised of the day of sale, that he might communicate it to the parties; and there is conflicting testimony in regard to the notice, it being doubtful whether it was published according to law. Under these circumstances, when the owners of the land came forward and asked for a new sale, it seems clear to me that the court should have granted it. The parties interested labored under an innocent mistake in the premises, and the only authority given the clerk to issue the order was conditioned that the non-resident parties should be advised through their attorney of the time of the sale. And this is not all. One of the parties called upon the purchaser, who was a party to the proceeding, the week before the sale, to inquire about it, and was informed by him that the sale would not take place at the term when it was actually sold. It does not appear that the deception was intentional, but the consequences to the other parties are the same, and the fact rebuts the charge that the mistake arose entirely from their negligence.

The alleged irregularity in the time of the sale is not so clear. The statute expressly provides that the order of sale shall not specify the time, but that the sheriff shall sell upon some day of the term, and that the order shall designate whether it shall be a term of the Circuit or County Court. (Partition act, §§ 31, 66.) It also provides that the sale shall be governed by the regulations prescribed for sales of real estate under execution, and section 38 requires the sheriff, after completing the sales, to report his proceedings to court. Although the general custom is to sell and make report at the next term after the order, I find nothing in the statute requiring it; and to apply to orders of sale in partition the provision in relation to the return of executions, would contradict the spirit at least, if not the letter, of the prohibition

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Murphy v. Redmond.

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fixing the time of sale. All the parties are supposed to be equally interested in offering the property at the most propitious time, and the sheriff is not compelled, as in proceedings *in invitum*, to sell and make return at a specific term. "The same regulations" prescribed as for sales upon execution must refer rather to the advertisement and manner of sale than to the time when the sale shall be made and returned.

Objection upon argument is made to the order because it did not conform to section 63 by directing whether the sale should be had at a term of the Circuit or County Court. This irregularity could not vitiate the title under the sale, yet the provision is one which the court is bound to notice, and should amend its order to conform to it.

The judgment of the District Court affirming that of the Circuit Court is reversed, the sale is set aside, and the cause remanded. Judge Currier concurs; Judge Wagner absent.

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EDWARD G. MURPHY, Plaintiff in Error, v. WILLIAM REDMOND,  
Defendant in Error.

1. *Practice, civil* — *Suggestion of death suspends further proceedings, when.* — After suggestion of the death of plaintiff in a cause, no further steps could be taken therein, except upon voluntary appearance of a representative of the deceased, or upon *scire facias*. Until then, the effect of his death was to stop all further proceedings. A cause appealed to the Supreme Court in that shape will be dismissed.

*Error to First District Court.*

*Draffen & Muir*, with *W. B. Napton*, and *Burke & Howard*, for plaintiff in error.

I. Upon the death of the plaintiff the cause of action abated, and no judgment could have been legally rendered in said cause. (Gen. Stat. 1865, p. 491, § 30.)

II. The court erred in taking any action or a step in said cause, after plaintiff had died and his death had been suggested

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Murphy v. Redmond.

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on the record, until a *scire facias* had issued to defendant to show cause why said suit should not be revived. (36 Mo. 47; 19 Mo. 35.)

*Ewing & Smith* and *E. S. Edwards & Son*, for defendant in error.

I. The jury having returned a verdict in favor of the plaintiff, and after verdict the defendant having filed motion for a new trial, which was continued by the court, the delay was occasioned by the court and not the plaintiff; and the plaintiff having died during said continuance, the court had authority to enter up judgment at the next succeeding term of the court. (4 Barb. 504.)

II. After the jury had rendered their verdict, and it had been received by the court, it then became the duty of the clerk to enter up the proper judgment. (Gen. Stat. 1865, ch. 133, p. 537, § 6; *Platte County v. Marshall et al.*, 10 Mo. 345.)

III. If either party die pending a motion for a new trial, judgment may be entered, at common law, after his death, or of the term at which the verdict was rendered. (2 Tidd's Pr. 932; Bac. Abr., letter F, Abatement, Bouv. ed.; 4 Burr, 227; 1 Taunt. 385; Compt. & Jer. 47; 1 Strange, 427; 2 Strange, 917; 4 Barb. 504; 1 Johns. 410; 1 Burr, 147, 219.)

IV. After the jury had rendered their verdict in said cause, the court had authority to enter a judgment thereon at the next term of the court, although the plaintiff may have died after the verdict of the jury was rendered, and before a judgment was entered thereon. (Gen. Stat. 1865, ch. 170, p. 679, § 7.)

V. The court having power to enter up final judgment after the death of the party, the power to dispose of the motion for a new trial followed as a matter of course, and is settled by the authorities above cited.

CURRIER, Judge, delivered the opinion of the court.

Upon the recovery of a verdict by the plaintiff in the Circuit Court, the defendant moved to set the same aside and for a new trial. The cause was then continued to the next term of the court. At the term to which the cause stood continued, the

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Murphy v. Redmond.

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death of the plaintiff was suggested and entered of record. No action was taken to bring in the dead party's representatives, nor did they appear voluntarily. The court nevertheless, without such appearance, and without the issue of a *scire facias*, proceeded at once to act upon the defendant's motion for a new trial, and overruled it, and then granted an appeal to the District Court, where the judgment was affirmed, and the defendant now brings the case here by writ of error.

All the proceedings in the lower court, subsequently to the suggestion of the death of the plaintiff, were *ex parte* and unwarranted. There was no party plaintiff in court. No steps could therefore be properly taken in the cause until that deficiency was supplied, either by the voluntary appearance of the deceased's representatives, or upon *scire facias*. Until that was done the effect of the death of the plaintiff was to suspend all further proceedings. (Hopkins v. Dysart, 36 Mo. 47; Fine v. Gray, 19 Mo. 33; Jarvis v. Felch, 14 Abb. Pr. 46; Warren v. Eddy, 13 Abb. Pr. 28; Reed v. Butler, 11 Abb. Pr. 128.) The overruling of the motion for a new trial (and it might with equal propriety have been sustained, so far as the regularity of the court's action was concerned) and the granting of the appeal were irregular and ineffective — mere nullities. The District Court acted upon an appeal when there was no respondent, and the cause has not lost its *ex parte* character by being brought here upon a writ of error. There is still but one party in court. The legal representatives of the dead man are not here. In this attitude of the case we do not feel called upon to pass judgment upon any ulterior questions which might arise if there were proper parties before us. The appeal was unauthorized and was improperly granted, for the reasons already stated. It must therefore be dismissed. The other judges concur.

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Koeltz v. Bleckman et al.

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AUGUST KOELTZ, Defendant in Error, v. BLECKMAN & HORN,  
Plaintiffs in Error.

1. *Contract — Part performance — Measure of damages.*—Where a vendor has failed wholly to comply with his part of the contract, yet if the vendee has received and made use of part of the property purchased, and is benefited by it, he must still pay for the property so received and used, the value, not to exceed the contract price, if that value exceed the damage he has sustained by reason of the failure to complete the contract. In such cases the party injured is compensated in damages; and when the vendor agrees to sell and deliver personal property at or within a particular time, and fails to perform his contract, the measure of damages is the difference between the contract price and the market value at the time it should have been delivered.
2. *Practice, civil — Verdict — Remittitur.*—A verdict for a sum greater than that claimed can not be cured by a remittitur of the surplus amount, when the finding was based on a total disregard of the evidence and the law.

*Error to First District Court.*

*Edwards & Son, and Flanagan, for plaintiffs in error.*

I. Plaintiff could not recover on this contract until he had delivered the whole of the 2,000 bushels. (*Champlin v. Rowley*, 18 Wend. 187; *Paige v. Ott*, 5 Denio, 406; *McKnight v. Dunlap*, 5 Barb. 36; 5 N. Y. 527; *Helm v. Wilson*, 4 Mo. 41; 16 Ohio, 238.) The English doctrine of part performance, as laid down in *Oxendale v. Wetherell*, 9 Barn. & Cress. 386, has not been adopted in this State; and in New York it has been criticised with unmeasured severity by Mr. Chancellor Walworth in *Champlin v. Rowley*, 18 Wend. 187.

II. The jury wholly misapprehended the case, or were so blinded by prejudice that they could not see the case in its proper light, and a new trial should be granted, notwithstanding the large sum remitted by the plaintiff. Such a verdict should not have been permitted to stand for a moment.

*McCord & Miller, and Ewing & Smith, for defendant in error.*

WAGNER, Judge, delivered the opinion of the court.

The doctrine contended for by the counsel for the plaintiffs in error, that an entire performance of the whole contract by the



defendant in error was a condition precedent to a recovery by him for any part of the wheat delivered, can not be maintained. That was the ancient rule, but a more just and equitable principle now prevails in this State. The reasonable doctrine has long since prevailed here, that where a vendor has failed to wholly comply with his part of the contract, yet if the vendee has received and made use of part of the property purchased, and is benefited by it, he must still pay for the property so received and used, the value, not to exceed the contract price, if that value exceeds the damage he has sustained by reason of the failure to complete the contract. (Lee v. Ashbrook, 14 Mo. 378.) In such cases the party injured is compensated in damages. And the law is well established that where the vendor agrees to sell and deliver personal property at or within a particular time, and fails to perform his contract, the measure of damages is the difference between the contract price and the market value at the time it should have been delivered. (Northrup v. Cook, 39 Mo. 208.) By the terms of the contract, the plaintiff was to deliver to the defendants 2,000 bushels of wheat, for which they agreed to pay him \$2.50 a bushel, making \$5,000 for the whole lot. All the wheat was not delivered, and the evidence shows that after the contract was made, wheat greatly advanced in the market. The defendant paid \$2,420 on the wheat received, and this action was brought by the plaintiff claiming \$2,308 as the balance remaining due. The answer asked for damages on account of breach of the contract, and also set up an offset for sacks and sack hire.

The jury returned a verdict for the plaintiff for the sum of \$2,879, whereupon he remitted \$1,500, and took judgment for the remainder, \$1,379.

The extraordinary verdict of the jury renders it certain that they disregarded the evidence and mistook the law. The question in this case is, will the *remittitur* cure the error? We think not. As the verdict was for more than the amount demanded in the petition, of course it could not be permitted to stand. By the judgment, after the \$1,500 was remitted, a calculation exhibits the fact that the plaintiff got just about

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Wilcox v. Rodman.

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the contract price of his wheat delivered, without regard to any injury or damage sustained in consequence of the breach of the contract, or for sacks or sack hire. The truth crops out in the whole proceeding, and the conclusion is irresistible that the defendant's side of the case was never considered by the jury; and to allow the judgment to stand by virtue of the *remittitur*, is really permitting the plaintiff to make up his own verdict.

It is unnecessary to remark that had the verdict of the jury been for the \$1,300 we would not have disturbed it, although we might not have been entirely satisfied with the finding; but as it is, there is no verdict to interfere with, and we have no hesitation in applying the correction. The court should have sustained the motion for a new trial.

I see nothing objectionable in the action of the court in reference to the admission or exclusion of evidence. The counsel have unnecessarily confused the case by drafting and getting instructions which have no bearing upon its merits, and the instruction given by the court of its own motion is not the law as heretofore declared by this court. It might be good in some cases, but is hardly applicable in this. There is but one single issue to be tried, and the law as applying to it is indicated in a prior part of this opinion. As far as enlightening the jury is concerned, one instruction will be found sufficient.

Reversed and remanded. Judge Currier concurs; Judge Bliss absent.

HORACE WILCOX, PUBLIC PRINTER, Petitioner, v. FRANCIS  
RODMAN, Respondent.

1. *Public printer—Mandamus—Act of March 28, 1870 (Wagn. Stat. 1127, §§ 29, 30), does not impair the obligation of a contract.*—The act of March 28, 1870 (Sess. Acts 1870, p. 85), abolishing the office of public printer after May, 1870, with the proviso that the then incumbent might continue the printing at a price twenty per cent. less than that before allowed by law, was not unconstitutional, as impairing the obligation of a contract, because, first, that office being a statutory one, may be controlled, modified, or abolished by law, and the officer goes out or holds on, subject to any change in the law;

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Wilcox v. Rodman.

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second, even were the office a franchise, it would be subject to all the conditions and reservations of the act creating it, and that act (Gen. Stat. 1865, ch. 20, § 30) contains an express reservation of the right to amend, modify, or repeal it at pleasure. The act providing for said deduction is not to be considered as a modification of the original act as to price, but as a tender of the work for a given period, and hence is not unconstitutional within the spirit of section 23, article 4, of the State constitution.

*Petition for mandamus.*

*Geo. P. Strong*, for petitioner.

I. The act of 1865 constitutes a contract with the person elected public printer on behalf of the State, and can not be repealed or modified in a manner that will infringe the rights of the petitioner without violating that provision of the Federal constitution and also of the State constitution, which prohibits the passage of any law that "impairs the obligation of a contract." Although the statute creates the office of public printer and provides for the election of such an officer, yet he is in no sense the agent of the State, as are the political officers through whom the functions of the government are performed. It can hardly be supposed that the Legislature intended by this law to reserve the power utterly to annul the contract at any moment, without regard to the interests of the other contracting party. Under such a construction no man could undertake to do the work of printing for the State. The provision of the act on this point is nothing more than an expression of the general power which the Legislature possesses without such a proviso to alter, modify, or repeal any law enacted by it; but this power, whether expressed or implied, is controlled by the provisions of the fundamental law, and can not be exercised in a manner which impairs the obligation of contracts or destroys private rights.

II. The Legislature has failed to modify, amend, or repeal this law by any constitutional or valid enactment. Section 30 of the act of March 28, 1870, is a nullity for two reasons: first, it is not enacted in accordance with the form prescribed in the constitution (art. 4, § 25); second, if it were, it impairs the obligation of the contract between the petitioner and the State. (Const. U. S., art. 1, § 10; *Woodruff v. Trapnall*, 10 How.

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 Wilcox v. Rodman.
 

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190 ; Commonwealth v. Mann, 5 Watts & Serg. 403 ; Winter v. Jones, 10 Ga. 190 ; Const. of Mo., art. 4, § 25 ; Gen. Stat. 1864, p. 31.)

*Johnson & Budd*, for respondent.

The public printer, under the late law, was an officer, and not a contractor. (Gen. Stat. 1865, p. 143, §§ 1, 2.) The fees of an officer may be reduced during his term, and this is provided in this case by the law creating the office. (Gen. Stat. 1865, p. 148, § 30.) The office of public printer was a creation of the Legislature merely, and might be abolished by the same authority. (State *ex rel.* Attorney-General v. Davis, 44 Mo. 129.) But to guard against any claim of vested right in the office of public printer, or of contract for the work and fees of the office, the law creating the office and fixing the fees for printing provided that the one might be abolished and the other modified. (Gen. Stat. 1865, p. 149, § 30.) The law creating said office is repealed. (Sess. Acts 1870, p. 85, §§ 28, 29.) The Legislature tendered to Horace Wilcox, by the description of the present State printer, a contract for the public printing until May 1, 1871, at a fixed rate, twenty per cent. below former fees. (*Id.*, § 30.)

BLISS, Judge, delivered the opinion of the court.

The plaintiff was elected public printer under the general act (Gen. Stat. 1865, ch. 20, p. 145) which fixes the prices at which the work shall be performed. The first section provides that "there is established an office to be called the office of public printer," and section 30 provides that "this chapter may be amended, modified, and repealed by the Legislature at pleasure."

On the 28th of March, 1870, the Legislature passed an act in relation to public printing (2 Wagn. Stat. 1127), sections 29 and 30 of which are as follows: "Sec. 29. The office of public printer is hereby abolished." "Sec. 30. This act shall take effect and be in force from and after the first Monday in May, 1870: *provided*, that the present State printer shall do the State

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Wilcox v. Rodman.

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printing and binding until the first Monday in May, 1871, at a price twenty per cent. less than the price now allowed by law."

The State printer presents a bill for printing to the Secretary of State for approval at the old price, and the Secretary refuses to approve it as presented, but deducts twenty per cent., and approves it with the deduction; and this is an application for a *mandamus* to compel him to approve it as presented. The petitioner claims that he was a contractor with the State for the full term for which he was elected, at the prices named in the statute, and that the act of 1870 is unconstitutional, in that it impairs the obligation of his contract. This claim can not be sustained for the reason, first, that the printer is a public officer, and the office is created by statute. It is undisputed that any statutory office may be controlled, modified, or abolished by law, and the officer goes out or holds subject to any change in the law. (*State v. Davis*, 44 Mo. 129, and cases cited.) But even if there were doubt about this, and the office were considered a franchise, it would be subject to all conditions and reservations of the act creating it; and we have seen that it contains an express reservation of the right to amend, modify, or repeal it at pleasure.

We do not see the radical difference contended for by counsel between this and other offices. It is true that bad faith on the part of the Legislature might greatly damage the petitioner, but that is not to be presumed, and he took the office with all its risks. There is hardly an office in the State, except that of judges, that is not subject to the risk of change of salary or fees; and the necessity spoken of, of making a large investment in printing material in order to perform the duties of the office, is not an inherent one. There are printing offices in the State owned by those upon whom no such necessity would be imposed, and the public printer is not bound himself to do the work, but may, and often does, get it done by others.

It does not matter whether the twenty per cent. deduction is to be considered as a modification of the original act as to price, or a tender of the work for a given period at a new price. We are inclined to view it as an offer by the Legislature in the interest of the late printer, which he could accept or otherwise. If he should go forward, and still do the printing under the offer, he



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State ex rel. Treasurer State Lunatic Asylum v. State Auditor.

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certainly can ask no higher price than the one tendered. — The latter view disposes of the objection to the new act, so far as the petitioner is concerned, because it does not comply with the constitutional requisition in regard to the manner of its enactment. As to him, the act simply abolishes his office, and tenders him the printing until May, 1871, at a price to be ascertained by computation. It does not come within the spirit of section 25, article 4, of the constitution referred to.

The other judges concurring, the writ is refused.

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STATE *ex rel.* TREASURER STATE LUNATIC ASYLUM, Petitioner,  
v. STATE AUDITOR, Respondent.

1. *Mandamus — Auditor — State lunatic asylum — Board of managers, requisition by.* — The act of March 23, 1870, touching appropriations for the State lunatic asylum (Sess. Acts 1870, p. 10), does not impose upon the State auditor the burden of examining and passing upon the legality of the several items of the bills incurred by the managers of that institution for purchases and improvements, etc., before paying amounts claimed. The law intrusts the expenditure of the fund to the good faith and official responsibility of the asylum managers. It is not for the auditor to go back of the requisition authorized by the act.

*Petition for mandamus.*

*Ewing & Smith*, for petitioner.

CURRIER, Judge, delivered the opinion of the court.

This is a petition for a writ of *mandamus* against the State auditor requiring that officer to draw his warrant in favor of the State lunatic asylum, in accordance with the requirements of an appropriation act passed March 23, 1870 (Sess. Acts 1870, p. 10). The petition shows that the managers of the asylum have drawn their requisition for the fund appropriated agreeably to the terms of the act; that the auditor nevertheless refuses to draw his warrant, and that the managers are consequently without the means of making the purchases and improvements authorized by law.

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Bunce, Adm'r of Beck, Jr., v. Beck, Ex'r of Beck, Sr.

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The petition is demurred to, and the only question presented is whether the purchases and improvements in question are required, under the law, to be effected on credit or for cash in hand. The auditor's idea seems to be that the work, etc., is to be done on credit, and that he is to audit the bills, examining and passing upon the legality of the several items thereof, prior to the payment. The law does not impose upon him that burden. It intrusts the expenditure of the fund to the good faith and official responsibility of the asylum managers, who are the State's trustees, and who are accountable to the State for the expenditure of the fund intrusted to their hands in accordance with the requirements of the act of appropriation. The appropriation act contemplates but one requisition and one warrant. Its command is: "The State auditor is hereby authorized and required to draw his warrant for the above sums of money appropriated, on the requisition of the board of managers of the State lunatic asylum." It is not for the auditor to go back of the requisition.

Peremptory writ ordered. The other judges concur.

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HARVEY BUNCE, ADMINISTRATOR OF ESTATE OF PRESTON BECK, JR., DECEASED, Defendant in Error, v. J. P. BECK, EXECUTOR OF ESTATE OF PRESTON BECK, SR., DECEASED, Plaintiff in Error.

1. *Estoppel in pais—Admissions—Directions.*—One is estopped from denying the right of another to do an act which was done under his direction, where an injury would result to the other from allowing the right to be disproved. There is no difference between estoppel by admission and direction, only that in the latter case the injustice of holding the party doing an act responsible to the person whose directions are followed, is even more apparent than in the former.

*Error to First District Court.*

*W. B. Napton, G. P. Strong, and N. Holmes*, for plaintiff in error.

I. The admission of the new depositions of Limerick and Mrs. Beck was against well-established rules of chancery practice—

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Bunce, Adm'r of Beck, Jr., v. Beck, Ex'r of Beck, Sr.

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rules that were not based upon any mere forms peculiar to English practice, but founded upon the regulations essential to insure justice and to keep out perjury. These witnesses had been thoroughly examined, cross-examined, and re-examined on all the points of fact which had occurred or could occur in the several interviews testified to. To allow their re-examination, after telling them wherein their testimony did not meet the case, is, to say the least, anomalous, dangerous practice, and against all the rules of chancery practice. (See 3 Greenl. 295, § 336, pt. 6, Redfield's ed.; Story on Eq. Pr., etc.) This is a proceeding according to the practice and principles of the chancery and ecclesiastical courts of England, and not according to the course of the common law; the facts are determined by the court, not by a jury. (Adams' Eq., by Brigham, 250, note 1; 19 Ala. 438; 20 Ala. 662; Miller v. Iron County, 29 Mo. 122; North Mo. R.R. Co. v. Green, 34 Mo. 159; Jones v. Brinker, 20 Mo. 87.)

II. All the conversation, as detailed by the witnesses (Mrs. Beck and Limerick), related to the meaning and effect of that letter. Not a word about independent orders. All the evils to be guarded against by excluding oral testimony relating to the meaning and effect of written contracts, would be admitted if one word of this testimony could be introduced.

*Wash. Adams, and Draffen & Muir, for defendant in error.*

I. An estoppel *in pais* being created, it would be an outrageous fraud, and ruinous to Bunce, to suffer Beck to question the propriety of this action of Bunce, induced as it was by his own conduct and orders. (See the case of Taylor *et al.* v. Zepp, 14 Mo. 482; Chouteau v. Goddin *et al.*, 39 Mo. 250; Darrell v. Odell, 3 Hill, 219; Bunce v. Beck, 43 Mo. 266.)

II. The point made by the defendant, that the new depositions of Mrs. Juliet A. Beck and Wm. Limerick could not be read as evidence because depositions of the same witnesses were then on file, has no foundation in law or reason, as applied to the courts of this State. The old English chancery practice in regard to depositions, orders of publication, passing publication,

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Bunce, Adm'r of Beck, Jr., v. Beck, Ex'r of Beck, Sr.

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etc., have never been adopted in this State, and are wholly inconsistent with our statute laws and practice in civil actions. In our practice, all actions are civil actions and all tried like actions at law. The modes of proof are precisely the same in all civil actions. If the depositions are not sufficiently definite, either party has the right to retake them and make out the points he may desire to prove.

BLISS, Judge, delivered the opinion of the court.

This case was before the court at the January term, 1869; and is reported in 43 Mo. 266, and the law of the case upon the additional facts now developed was substantially declared in the opinion there given.

It appears that Mrs. Beck, as guardian for her three children, had received an advance from the estate of Preston Beck, Jr., of \$10,000 for each child, which amount had been distributed, with the knowledge of James P. Beck, to each of the other heirs as well. But to meet any contingencies that might arise, they or their guardians gave their notes to the administrator, and after the Probate Court had decided that the will of Preston Beck, Jr., could operate only upon one-third of his estate, and that James P. Beck, as executor, devisee and legatee of Preston Beck, Sr., was entitled to two-thirds of the whole as well as one-ninth of the remainder, Bunce, as administrator, deemed it necessary to call in these notes, and accordingly had commenced suit upon the one for \$30,000 given by Mrs. Beck, and on the one for \$10,000 given by Silver. They had appealed from the allowance of two-thirds of the estate to James P. Beck, and he was resisting a demand of \$21,000 allowed to Mrs. Beck against the estate. She visited him in St. Louis for the purpose of adjusting their differences, and especially to obtain a discontinuance of the suit against her upon the note. A written agreement was entered into which embraced only the disputed claim of two-thirds and the allowance of the \$21,000, and so far all would seem to be plain that there was no arrangement or understanding about anything else. But Mrs. Beck was not satisfied. She desired and expected the suit against her to be dismissed and her note to be

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Bunce, Adm'r of Beck, Jr., v. Beck, Ex'r of Beck, Sr.

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given up; and James P. Beck writes a letter to Bunce upon the subject, the same given in the statement of the case in 43 Mo. 266. But this letter did not satisfy her. She wanted a positive order to give up the specific note, while the letter directed him to give up "any papers, notes, documents, etc., that will not infringe," etc. Bunce held no other note, but he might not know whether its surrender would infringe upon James P. Beck's right to the two-thirds and one-ninth of the estate or not. A portion of the estate was still in New Mexico, of which he knew nothing, and it was his duty to distribute the estate here according to law, and the letter as written would throw a burden upon him which he would not be likely to assume. Mrs. Beck and Limerick, who was aiding her, understood that the letter called for the note and the discontinuance of the suit; still it was not direct and straightforward, and they wished it changed. But Beck refused to change it, and insisted that it meant as they understood it; that Bunce would give it up, etc., and to tell him so. As the testimony appeared when the case was formerly before us, it was doubtful whether J. P. Beck intended to send an absolute direction to Bunce to give up the note and dismiss the suit, or whether he intended to deceive Mrs. Beck about the meaning of the letter, and induce her to compromise the other matters by making her think that the matter of the note was also arranged. In our doubt upon the subject, and not to infringe the well-settled rule that every writing should speak for itself, we directed a new trial, and called the attention of the parties to a question of fact that had been left in doubt. We distinctly held then—and the position is not and can not be disputed—that if the defendant in error sent a message to Bunce, the administrator, to dismiss the suits and give up the notes, it would be a full justification of his action, and that Mr. Beck would be estopped from objecting to it.

A new trial has been had, and the attention of the witnesses has been called more distinctly to the time in relation to the delivery of the letter, and to the character of the directions sent by the defendant to the plaintiff; and from that testimony it plainly appears that defendant Beck not only told Mrs. Beck



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Bunce, Adm'r of Beck, Jr., v. Beck, Ex'r of Beck, Sr.

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and Limerick that the letter contained an order to give up to her the note and dismiss the suit, and that Bunce would so understand it, but both on the day when it was written and on the next day, when Mrs. Beck called for more specific directions, he told them to tell Bunce for him to deliver up the note and dismiss the suit, and that if he did not do it he would come up and do it himself. As they were leaving he told Limerick that if Bunce had any hesitation to do as he had requested him, to telegraph him and he would come up himself and have the suit against Mrs. Beck dismissed. On their return to Boonville Mrs. Beck handed the letter to Bunce, and he declined to act upon it because, although it contained a general order to give up all notes, papers, etc., it was indefinite, and seemed hampered by a condition. But when they told him what Mr. Beck had said he at once complied with his direction by giving her an order upon his attorneys to dismiss the suit and surrender the note. •

If there were any doubt as to the kind of message sent by Mr. Beck and the way he intended it to be understood, that doubt would be removed by what occurred between him and Mr. Limerick after his return to St. Louis. Upon this, Mr. L. testifies as follows: "I returned to St. Louis from Boonville. I met Mr. Beck on Fourth street as I was returning from the railroad depot; he asked me what success Mrs. Beck had in Boonville. I told him that Mr. Bunce had delivered to Mrs. Juliet A. Beck an order on Ryland & Son to dismiss the suit against her and to deliver up to her her note. He appeared very much gratified, and said it had turned out as he had told me it would. Mr. Beck requested me to hunt up Mr. David Silver and try and prevail upon him to make the same arrangements with him that he had made with Mrs. Juliet A. Beck," etc., etc. After the settlement with Silver had been effected, Mr. Beck seems to have become dissatisfied with Mr. Bunce for giving up the notes, and inquired why he did it; and on Mr. Bunce asking why he sent him such messages by Mrs. Beck and Limerick, he replied that nothing else would satisfy them, plainly admitting that some messages were sent besides the letter.

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Bunce, Adm'r of Beck, Jr., v. Beck, Ex'r of Beck, Sr.

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From reading the testimony, it would seem that Mr. Beck was determined to sign no paper that would ignore his right to two-thirds of the estate and one-ninth of the remainder. And it would further seem that he meant Mrs. Beck and Limerick to understand that the suit against her was to be dismissed by Mr. Bunce, and her note surrendered. Whether he really intended to have Mr. Bunce so act, designing to look for his compensation to the New Mexican estate or to Mr. Bunce himself, as he is now doing, or whether he supposed he would disregard a verbal order, is, perhaps, not clear. There is reason to believe that in effecting a settlement of the main controversy respecting his right to two-thirds of the estate which he claimed in opposition to the will, he was willing to promise almost anything, taking care to keep himself right on paper, and thinking, perhaps, he would not be bound by what he might say. It is certain that he not only repeatedly gave an interpretation to his letter in accordance with the views of Mrs. Beck, but sent positive directions to Mr. Bunce to discontinue the suit against her and give up her note. Of this there can be no reasonable doubt, and I find no contradiction in this regard between the testimony given at the former trial and that offered at the last—there being only more clearness and precision in the last in regard to the times and connection in which they were given.

Finding such directions to be clearly proved, we have only to apply the principle of law announced when the case was last before us. Mr. Beck is clearly estopped from denying the right of Mr. Bunce to do what was done under his direction. It is of no manner of consequence what interest in the estate Mr. Beck is entitled to, or what were his secret motives in sending the message—whether he thought his words would not bind him, or whether he intended to look to the New Mexican estate for his compensation; in a word, whether he acted fraudulently or honestly, the effect is the same. Judge Napton, in *Taylor et al. v. Zepp*, 14 Mo. 482, quoting *Darrell v. Odell*, 3 Hill, 219, says that “in order to constitute an estoppel *in pais*, there must be, first, an admission inconsistent with the evidence proposed to be given or the claim offered to be set up; second, an action by the other

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Bunce, Adm'r of Beck, Jr., v. Beck, Ex'r of Beck, Sr.

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party upon such admission; third, an injury to him by allowing the admission to be disproved." This is quoted with approval in *Newman v. Hook*, 37 Mo. 207, and squarely meets the case at bar. There is no difference between an estoppel by admission and one by direction, only, in the latter case, when the direction is acted upon, the injustice of holding him responsible for such action to the person whose directions are followed, would be even more apparent than in the former.

With regard to the Silver note the testimony is not so clear, but, taken in connection with the other, no doubt can be entertained that the action of Bunce was warranted by the acts of Beck. It was as necessary to settle with him as with Mrs. Beck. That this appeal against Mr. Beck should be dismissed was of the highest importance to him, for until then his claim to two-thirds of the estate, in opposition to the will and in addition to his share under it, could never be considered safe. He could but realize the possibility, at least, that our courts would give effect to our own laws in regard to distribution and the power of disposition by will, and the possibility of failure in so establishing those of a distant territory, and of domicile under them, as to make good his claim. Accordingly we find him very anxious to effect the settlement with Mr. Silver as well, and that he sought the aid of Mr. Limerick in the matter. In regard to that, Mr. Limerick further testifies that "Mr. Beck manifested the greatest anxiety that I should find Mr. Silver that night (the night he reported Mrs. Beck's success in getting up her note), as late as it was, it being near eleven o'clock, and make the arrangement with him, as he, Beck, expected to leave the city next morning and wanted the matter fixed up that night before he left. Beck went with me to different places to find Mr. Silver, and at last we found him at the Planters' hotel. I told Mr. Silver what had been done, etc., and that I thought he could make the same arrangement with Mr. Beck," etc. He agreed to meet them next morning, and the same papers were drawn up as with Mrs. Beck, Mr. Beck insisting that under the letter he would be entitled to, and would get, his note. Silver and Mr. Beck were not on speaking terms, and Limerick acted somewhat as a go-between,

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Burke v. Seely et al.

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to bring about the settlement as requested by Mr. Beck; and when the letter was given to Silver, Mr. L. also gave him a letter of introduction to Mr. Bunce, stating that the same arrangement had been effected as with Mrs. Beck, whereupon he also gave him an order on Ryland & Son to dismiss the suit and surrender the note. It is perfectly clear that this action of Bunce was induced and brought about by Mr. Beck. His action in relation to the note of Mrs. Beck was expressly approved, and he was told, through Mr. Beck's agent for the settlement, that the same arrangement had been made as with her. What could he do but perfect that arrangement? and it is too late now to say that he went beyond his authority.

It is true, in regard to this general transaction there is some adverse testimony, especially that of Mr. Bulger, clerk of Mr. Beck, and it is also true that, in our view of the facts, we are compelled to consider the acts of Mr. Beck as somewhat crooked. But in view of motives and probabilities, we are compelled to regard the facts found by the Circuit Court, as warranted by the evidence as a whole, and the action of the District Court in affirming its judgment is affirmed. The other judges concur.

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**EDMUND BURKE, Plaintiff in Error, v. JOHN S. SEELY et al.,  
Defendants in Error.**

1. *Contracts—Sale of lands—Specific performance—Equity.*—A., in order to befriend B., permitted him to occupy one of his lots, and furnished him with lumber to build a small house upon it, with a verbal understanding that he would make a title if he received his pay. B. became insolvent, and failed to pay. The property was sold under execution and bought in by A., to whom the possession was surrendered by B. A remained in undisputed possession afterward. Four years subsequently, on an execution against B., his interest in the premises was levied on and sold; and C. being the purchaser, brought his bill for specific performance against A. *Held*, that C. had no claim to the property, even though the first execution sale were invalid.
2. *Specific performance, bills for.*—Bills for specific performance appeal to the conscience and discretion of the court.

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Burke v. Seely et al.

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*Error to First District Court.**Ewing & Smith*, for plaintiff in error.*Draffen & Muir*, for defendants in error.

BLISS, Judge, delivered the opinion of the court.

In 1859, one Evans took possession of two town lots in Tipton, the property of W. T. Seely, now deceased, and built a house upon the same, the said Seely furnishing the greater part of the lumber. Evans testifies that he went into possession with the knowledge of Seely; that there was no writing between them; that he expected to pay what the lots were worth, but no price was agreed upon, while the answer of Seely's heirs admits that the price was \$100; but it is undisputed that the contract was verbal, if one was made; that Evans paid nothing upon it, and that Seely advanced for the improvements lumber of the value of \$417, for which he received no pay. It also appears that Evans became involved; that sundry judgments were rendered against him in 1862; that executions were issued and levied upon Evans' interest in the property; and in October, 1863, said interest was bid in by Seely for the sum of \$250. The said Evans at once gave up to Seely his interest in and the possession of the property, in payment, as he says, of what he owed him, and the latter and his heirs have ever since been in undisputed possession of the same as owners thereof. It also appears that in December, 1866, new executions were issued upon all the judgments against Evans, and in March, 1867, his interest in said property was again sold and bid in by the plaintiff for \$44.

The plaintiff in the present suit presents his petition to the Moniteau Circuit Court for a specific performance of the contract between Evans and Seely, claiming that the contract is in full force and that he is the owner of Evans' equity by virtue of his said purchase. He does not tender the purchase money or bring any money into court, but says he is willing to pay the original \$100 and interest. There is no charge of fraud in any of the transactions pertaining to the lots, and the plaintiff relies



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Burke v. Seely et al.

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solely upon his equity as the purchaser of Evans' naked interest. The Circuit Court held that the first execution sales, under which Seely, in 1868, bid in Evans' interest, were irregular and passed no title, and gave the plaintiff a decree for specific performance, which was reversed in the District Court.

The judgment of reversal was correct; there is no equity in the plaintiff's case. Seely, in order to befriend Evans, permitted him to occupy one of his lots, and furnished him with lumber to build a small house, with the understanding that he would make a title if he received his pay. Evans could not pay, and the property was surrendered, and the contract, such as it was, was canceled. It matters not whether the sheriff's sale in 1863 were good or not. The plaintiff has no better claim than Evans would have had, and it will not be pretended that he, four years after the surrender and cancellation, could come in and enforce an alleged contract, which at best was of the most shadowy character. It is very doubtful whether Evans ever had such an equity as could be sold on execution, but he certainly did not have one four years after he had honestly given up all claim to the property. We do not suppose a debtor can surrender an interest, the proper subject of levy, for the purpose of placing, or so as to place it, beyond the reach of creditors; but if they would place themselves in the debtor's shoes, they should act more promptly, proceed at once to ascertain his interest, and perform his contract. Bills for specific performance appeal to the conscience and discretion of the court, and it would be altogether against conscience to take this property from the defendants and give it to the plaintiff upon payment merely of the \$100 and interest.

The other judges concurring, the judgment of the District Court is affirmed.

JOHN G. PUTNAM AND T. N. STEVENS, Defendants in Error, v.  
DANIEL ROSS, J. C. MEDSKER, AND J. H. ARDINGER, Plaintiffs  
in Error.

1. *Mechanics' liens*—*Act not to be construed strictissimi juris, but so as to secure substantial justice.*—In suit on a mechanic's lien by the sub-contractor against the owner of the premises, plaintiff's notice of lien gave the name of his real debtor, but coupled with it that of a third party who was not liable. *Held*, that if defendant was not misled to his injury by the mistake, the error would not vitiate the lien, and that, in the absence of proof, no presumption would arise that defendant was so misled. The theory that the mechanics' lien act is in derogation of the common law, and should therefore be construed strictly as against those seeking to avail themselves of its benefits, is not supported by the better decisions, which hold that its provisions should be so interpreted as to secure the classes of persons named in the act, on their complying substantially and in good faith with its provisions

*Error to First District Court.*

*Twiss & Medsker*, for plaintiffs in error, urged among others the following points:

I. The statute creating the lien is in derogation of the common law, and must be strictly complied with by every person who asserts a claim of right under it. "And any ambiguity in any proceeding necessary on the part of the party seeking to enforce the lien, must operate against the party making it." (*Wade v. Rutz*, 18 Ind. 307; *Lynch v. Cronan*, 6 Gray, 531; *Schulenberg v. Bascom*, 38 Mo. 188.)

II. Plaintiffs allege the giving of notice of debt due from Daniel Ross, and attempt to support this allegation by proof of notice of debt due from a copartnership known by the name and style of Messrs. Ross & Shane. (*Russell v. Bell*, 44 Penn. 47.) Ross and Shane had formerly been partners, but had dissolved, and Shane had nothing to do with the transaction. The suit was not against Shane at all, and plaintiffs had no cause of action against him. (*Hauptman v. Catlin*, 3 E. D. Smith, 666; *Tibbetts v. Moore*, 23 Cal. 208; *Peck and Wife v. Hensley*, 21 Ind. 344.)

*A. A. Tomlinson*, and *Ewing & Smith*, for defendants in error.

CURRIER, Judge, delivered the opinion of the court.

This suit was brought to enforce a mechanic's lien for material furnished by the plaintiffs to the original contractor. In giving the owners notice of their claim, the plaintiffs stated the indebtedness to be due from "Ross & Shane, contractors." It turned out that the claim was against Ross alone, his former partner, Shane, having no interest in the transaction. The defendants insist that the error in the notice is fatal to the plaintiffs' lien. Whether or not it is so, is the question for determination.

The defendants' view seems to be founded upon the theory that the mechanics' lien enactment is in derogation of the common law, and that its provisions are therefore to be construed with a rigid strictness against those who seek to avail themselves of its intended benefits. There may be decisions which lend support to that theory, but the better opinion is that the provisions of the mechanics' lien law should be interpreted so as to carry out the object had in view by the Legislature in enacting it, namely: the security of the classes of persons named in the act, upon its provisions being in good faith substantially complied with on their part. It has become the settled policy of this State, as in most if not all the States, to secure mechanics and material-men by giving them a lien upon the property they have contributed to improve or create. The law itself has grown up from small beginnings to its present unquestioned importance. And the whole course of legislation on the subject shows that it has been the intention of the Legislature to avoid unfriendly strictness and mere technicality.

The spirit and purpose of the law is to do substantial justice to all parties who may be affected by its provisions. It has therefore been enacted (Gen. Stat. 1865, p. 911, § 19) that when a party who deals with the principal contractor, and not directly with the owner, wishes to avail himself of the benefits of the enactment, he shall notify the owner, ten days in advance of filing the lien, of his purpose to do so, stating in the notice the amount of his claim, and "from whom it is due." The plaintiffs sought to comply with that requirement, but failed to state

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Tucker v. Gest et al.

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with precision who was their debtor, giving the name of a business firm, instead of the name of the party who had been the senior member of that firm. He gave the name of his real debtor, but erroneously coupled with it the name of a third party who was not liable. Were the defendants misled to their injury by this mistake? If so, they ought not to suffer in consequence of the plaintiffs' inadvertence. But there is no probability that they were harmed by the error. At all events, it is not to be so presumed in the absence of evidence. If the error wrought the defendants any harm, it can not be difficult for them to show it; but they aver nothing and prove nothing in that direction. Their objections rest on purely technical and over-critical grounds.

Substantially the same point was raised in *Tibbetts v. Moore*, 23 Cal. 208, where it was held that a notice which stated that the materials were furnished to "Moore & Co." was sufficient, although the materials were in fact furnished to Moore alone. So, in *Hauptman v. Catlin*, 3 E. D. Smith, 666, it was held that where a notice stated a claim against A. and B., his wife, upon a contract with A. alone, and the contract was in fact made with the husband, acting merely as the agent of his wife, the notice was nevertheless good.

I am of the opinion that the notice under consideration should have been received in evidence, and consequently that the judgment of the District Court, reversing that of the Common Pleas, ought to be affirmed. Judge Bliss concurs; Judge Wagner not sitting.

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WILLIAM J. TUCKER, Defendant in Error, v. MARY E. GEST AND  
JOSHUA H. GEST, Plaintiffs in Error.

1. *Married women may subject their ordinary estate to mechanics' lien.*—Under section 21 of the mechanics' lien act (Wagn. Stat. 911, § 21) a married woman may so far bind her ordinary estate by contract as to subject it to a mechanic's lien.

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Tucker v. Gest et al.

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*Error to First District Court.*

*Crandall & Sinnet*, for defendant in error.

I. In order to give a lien, the contract must be such as can be enforced at common law (Houck on Mech. Liens, 233; Kirby v. Tead and Wife, 13 Metc. 149); and if either party be incapacitated, the contract or agreement is futile and unavailing. (Houck on Mech. Liens, 233; 2 Blackst. Com. 114; Chit. on Cont. 4, 5, 29.) And it is a well-established rule of law that a wife can not bind herself by an executory contract. (Reeves' Dom. Rel. 182; 2 Kent's Com. 150; 7 Conn. 224; 3 Mo. 254; 40 Mo. 261; 6 Wend. 11; 4 N. Y. 9; 12 B. Monr. 665.)

II. The land sought to be held is not the sole and separate property of the wife (4 N. Y. 9; 28 Mo. 551; 40 Mo. 61), and can not be conveyed or encumbered by the wife except by deed executed jointly with her husband. (Gen. Stat. 1865, p. 444, § 2.)

III. Section 21, chapter 195, Gen. Stat. 1865, does not change the common law or grant liens in such cases as this. (18 N. Y. 265; 1 Hilton, 476; 21 Barb. 546, 551; 11 How. Pr. 333; 16 How. Pr. 96, 158; 4 Duer, 96.) By section 21 the Legislature intended to place married women upon the same footing as any other persons having building or improvements made upon their property. The section includes equitable owners, married women, and infants. (Hauptman v. Catlin, 20 N. Y. 247; Greenough v. Wigginton and Wife, 2 Greene, Iowa, 435.)

BLISS, Judge, delivered the opinion of the court.

The plaintiff painted and glazed a dwelling-house belonging to defendant, Mary E. Gest, a married woman, perfected his mechanic's lien upon the property and filed his petition in the Court of Common Pleas of Pettis county to enforce the same. The petition showing all the facts was demurred to by said Mary E. because, in setting up the contract and the plaintiff's work under it, it did not show that it pertained to her sole and separate property—she claiming that she could make no contract so as to



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Tucker v. Gest et al.

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create a lien upon her property unless held for her sole and separate use. The court gave her judgment upon the demurrer, which was reversed in the District Court.

The whole subject of mechanics' liens is purely statutory, and we have only to consult the statute to find their extent. Section 1 of the act (Wagn. Stat. 907) provides for liens upon property for work, etc., "under or by virtue of any contract with the owner and proprietor thereof," etc. Section 21 defines who are owners, and is as follows: "Every person, including all *cestui que trusts*, for whose immediate use, enjoyment, and benefit any building, erection, or improvement shall be made, shall be included by the words 'owner or proprietor' thereof, under this chapter, not excepting such as may be minors over the age of eighteen years, or married women."

The language of the act quoted seems too plain to admit of construction. It is not disputed that Mrs. Gest is the owner of the building, and that the work was done by contract with her. Nor is it disputed that the improvement was made for her immediate use, enjoyment, and benefit. But, for fear it might be claimed that the lien can not extend to work done under contract with persons incapable of contracting, the statute expressly provides that the words "owner," etc., with whom contracts are made, shall include minors over eighteen years and married women. Their disability to contract is *pro tanto* expressly removed, and while the mechanic might not be able to obtain a general judgment against her, he shall be entitled to a lien upon the property improved by his labor, in the same manner as though it belonged to the husband and the contract were made with him.

We are asked to say that this liability can only apply to the wife's separate estate. But the statute does not so limit it, and if there were any doubt in its construction, that doubt should be solved in favor of the lien. To hold as requested, would open a very wide door for dishonesty and fraud, and enable men, as well as women, to improve property at the expense of others, and live in luxury upon or from the proceeds of the estate of the wife, rendered valuable by the labor and property of their neighbors.

Without the provision of section 21 before quoted, there is no

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Pemberton v. Johnson et al.

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doubt that a lien would lie upon the separate property of the wife, for she is able to make contracts in relation to it; and it is so held in *Hauptman v. Catlin*, 20 N. Y. 247. This statute was doubtless necessary to enable a married woman or her agent to so far bind her ordinary estate by contract as to subject it to a mechanic's lien.

The other judges concurring, the judgment of the District Court is affirmed and the cause remanded.

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GEO. M. PEMBERTON, Plaintiff in Error, *v.* HARRIET P. JOHNSON, JAMES M. JOHNSON, AND THOMAS B. PEMBERTON, TRUSTEE, Defendants in Error.

1. *Married woman*—*Conveyance to wife, not for separate use—Deed of trust given for—Bill in equity to subject property to debt.*—A married woman has no power to bind herself by a promissory note, except as to her sole and separate property. Yet, when she purchases real estate—even though the purchase deed does not create an estate for her sole and separate use, but an ordinary one, in which her husband had a marital interest—and gives her notes for the purchase money secured by mortgage upon the property purchased, the vendee can hold it in equity for such purchase money. And the lien created by the deed of trust can be enforced by an action analogous to a late proceeding in chancery to subject the property to the payment of the debt, although no personal judgment can be given upon the notes.

*Error to First District Court.*

*F. P. Wright*, for plaintiff in error, cited *Boeka v. Nuella*, 28 Mo. 180; 2 Kent's Com. 134; *Buell v. Sherman*, 28 Ind. 464; *Glass v. Warwick*, 40 Penn. St. 140; *Ashby v. Winston*, 26 Mo. 210; *Chilter v. Braiden*, 2 Black, 458.

*Hicks & Phillips*, for defendants in error.

I. The petition presents the case of a simple statutory proceeding to foreclose a mortgage. As such it is an action at law, and no equitable relief can be had thereon. (R. C. 1855, §§ 1, 2, 18, chapter on Mortgages; 9 Mo. 283-4; 43 Mo. 502; 36 Mo. 384; *Myers v. Field et al.*, 37 Mo. 441; 8 Mo. 257; 37 Mo. 386-7.)

II. The notes were properly excluded. Having been executed alone by a *femme covert*, they were void at law. (Bauer v. Bauer, 40 Mo. 61.)

BLISS, Judge, delivered the opinion of the court.

The plaintiff brought his action in the Pettis Circuit Court to foreclose a deed of trust given by defendants, Harriet P. Johnson and husband, to secure certain promissory notes made by said Harriet P. while a married woman. It appears that Mrs. Johnson purchased of the plaintiff the land embraced in the deed of trust; that it was conveyed to her by an ordinary deed, and that she gave him these notes for the purchase money. It does not appear that the conveyance to her purports to create an estate for her sole and separate use, in reference to which she can make contracts, but an ordinary estate, in which the husband has a marital interest.

The claim that a married woman, except in reference to her sole and separate property, has no power to bind herself by a promissory note, is doubtless correct. But it is equally true that where she purchases real estate, gives her notes for the purchase money, secured by mortgage upon the property purchased, the vendor can hold it in equity for such purchase money. To seek to keep the property and avoid payment is grossly dishonest, and the law is not so defective as not to furnish a remedy for such a fraud. (Glass v. Warwick, 40 Penn. St. 140.)

It does not matter whether the notes, as independent contracts, were good or not. They are evidences of the amount due for the land, and should be received as such; and the trust deed, given by husband and wife, shows that all parties intended to create a lien upon the property without knowing, perhaps, that the vendor's lien already existed. Such a lien can be enforced by an action analogous to a late proceeding in chancery to subject the property to the debt, although no personal judgment can be given upon the notes.

The plaintiff's evidence was ruled out in the lower courts principally upon the ground that the proceeding was not in equity, but instituted under the statute. There can be no doubt, upon

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Pemberton v. Johnson et al.

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perusing the petition, that while drawing it, the idea that his claim was only an equitable one had not entered into the mind of the pleader. He joins other claims with these notes, seeks a personal judgment against the wife, and gives other indications that he is seeking to foreclose under the statute. But this court has always made and recognized a clear distinction between such a proceeding and one for equitable relief. (*Meyers v. Field*, 37 Mo. 434; *Fithian v. Monks*, 43 Mo. 502.)

Our only hesitation in the matter arises from the frame of the petition. It would not be right to reverse a judgment given for the right party, if, by rejecting irrelevant parts of the petition as surplusage, enough would be left to support the judgment. Had the present plaintiff obtained the judgment to which the facts entitled him, we might, perhaps, by rejecting parts of his petition, find enough left to sustain the equitable relief given him. In that case his judgment should stand. But having obtained none, and his equitable rights not being concluded by the nonsuit he suffered, it is better that he commence again and present his real case, unencumbered and without ambiguity.

The judgment, therefore, of the District Court is affirmed. The other judges concur.

END OF JULY TERM.

CASES  
ARGUED AND DETERMINED  
IN  
THE SUPREME COURT  
OF  
THE STATE OF MISSOURI,

AUGUST TERM, 1870, AT ST. JOSEPH.

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ALEXANDER S. SAVONI *et al.*, Plaintiffs in Error, *v.* WM. T.  
BRASHEAR *et al.*, Defendants in Error.

1. *Practice, civil — Evidence — Surprise — New trial — Nonsuit.*— A plaintiff, after verdict, can not have a new trial on account of having been surprised by evidence of defendant. If unprepared to meet defendant's evidence, he should suffer a nonsuit, after which he may sue again for the same cause of action.

*Error to Fourth District Court.*

*Williams & Eberman*, for plaintiffs in error.

Plaintiffs were taken by surprise by the evidence of Patterson, and were entitled to a new trial.

*Barrow & Carr*, for defendants in error.

BLISS, Judge, delivered the opinion of the court.

The plaintiffs brought suit upon two promissory notes executed by one Sterne and indorsed to them, and defendants set up payment and satisfaction to said Sterne after the maturity of the notes. The answer was not denied, and plaintiffs offered testi-



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Savoni et al. v. Brashear et al.

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mony tending to prove the assignment for value before the notes fell due. The defendants offered testimony as to the mode and manner of payment, and a witness testified that Savoni, one of the plaintiffs, was present at the time the payment was made to Sterne. After judgment for defendants the plaintiffs filed a motion for a new trial, upon the ground of being taken by surprise at the testimony of the witness as to the presence of Savoni at the time of the adjustment of the debt, and, to sustain the motion, filed several affidavits showing that at this time Savoni was in Boston.

There are circumstances tending to throw suspicion upon the relations of Sterne and the plaintiff that should weigh with the tribunal passing upon the facts; but we have only to consider whether, under the settled rules of law, the motion for a new trial should have been granted. We are inclined to think that the plaintiffs might have been properly taken by surprise at this testimony. There was nothing in the pleadings to lead them to suppose it would be offered. They could not be expected to be prepared for it, and, if they had no other remedy, a new trial should have been granted. But they were not thus remediless, for a nonsuit might have been suffered without prejudice to a new suit. In 3 Graham & Waterman, 968, the rule is thus stated: "A plaintiff, after a verdict against him, can have no claim to a new trial on account of his having been surprised by any evidence of the defendant. If the plaintiff finds himself unprepared to meet the defendant's evidence, he always has it in his power to suffer a nonsuit, which will leave him at liberty to sue again for the same cause of action. It would be giving the plaintiff too great an advantage to permit him to take the chance of a verdict, and, when it is lost, to relieve him from the verdict and give him a chance with another jury, merely because the evidence against his claim was stronger on the first trial than he expected it would be."

The judgment is affirmed. The other judges concur.

STATE OF MISSOURI, Defendant in Error, v. EDWARD R.  
MURPHY, Plaintiff in Error.

1. *Practice, civil*—*Supreme Court will not determine credibility of witnesses.*  
—The jury are the proper judges to determine the credibility of witnesses, and this court will not interfere with their verdict when the appeal raises the simple question of the weight of testimony.

*Error to Fifth District Court.*

*Pike & Hereford*, for plaintiff in error.

*Davis*, for defendant in error.

WAGNER, Judge, delivered the opinion of the court.

The defendant was indicted and convicted in the Buchanan County Circuit Court for malicious mischief in cutting to pieces and destroying a wagon belonging to one Charles Heuman. There is no objection made to any instruction or ruling of the court, but the writ is prosecuted on the sole ground that the verdict is against the evidence.

For the prosecution, one witness swore positively and directly that he saw the accused commit the offense. The defendant introduced evidence tending to contradict the witness for the prosecution, and going to show that defendant was at a different place at the time the mischief took place, and that the act could not have been committed by him.

The evidence was all before the jury, and they were the proper judges to determine the credibility of the respective witnesses. They were conversant with their character, saw their manner of giving in their testimony, and knew which was the most worthy of belief. There is nothing presented in this case justifying our interference.

Judgment affirmed. The other judges concur.

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State National Bank of St. Joseph v. Walser.

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STATE NATIONAL BANK OF ST. JOSEPH, Defendant in Error, v.  
CHARLES G. WALSER, Plaintiff in Error.

1. *Contracts—Judgment—Agreement to purchase—Release of judgment lien, effect of—Separation of judgment into parts.*—In a suit on a written agreement to pay a certain sum for an assigned judgment, where there was no allegation of fraud, and the case was made to turn simply upon the existence or non-existence of a consideration for defendant's promise, *held*, that the judgment being a valid and binding one, its transfer was a sufficient consideration for the agreement, although it appeared that prior to the transfer the assignor had released the lien of the judgment on certain real estate. And the fact that the agreement embodied an arrangement that defendant was to pay a certain proportion and other assignees the remainder, would not constitute an assignment of the judgment in parts.

*Error to Fifth District Court.*

*Ledergerber*, for plaintiff in error.

*Pike*, for defendant in error.

CURRIER, Judge, delivered the opinion of the court.

This suit is founded upon a written agreement by which the defendant, in consideration of the assignment to himself and others of a certain judgment, promised to pay to the plaintiffs a sum equal to two-fifths of the judgment assigned; the other assignees, by the same instrument, agreeing to pay the remaining three-fifths.

The answer admits the agreement and its execution, as alleged, but avers, in avoidance of it, that it was without consideration and void. This is the substance of the answer, although it goes into great detail in alleging the facts and circumstances which are supposed to result in the conclusion that the agreement was ineffectual for the want of a sufficient consideration to support it.

The pleadings show that the judgment assigned was rendered by the Buchanan Circuit Court, September 24, 1861, in favor of the plaintiffs, against J. C. Roubidoux and others. No objection is urged against the validity of this judgment. The defendant, however, at the trial, offered evidence with a view to show that certain proceedings which were had in 1866-7, for the purpose of

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State National Bank of St. Joseph v. Walser.

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renewing the judgment, were irregular and void; that the plaintiffs had released from the lien of the judgment a portion of a certain city lot, which was subsequently advertised for sale upon the renewal execution, and that the agreement sued on was executed on the day the sale was to have taken place; the defendant having, in the meanwhile, purchased from Roubidoux a portion of the land so advertised.

The court excluded the evidence as irrelevant to the issues of fact made by the pleadings, and properly. There was no allegation of concealment, misrepresentation, or of any form of fraud. The case, by the pleadings, was made to turn upon the existence or non-existence of a consideration for the defendant's promise. The consideration shown was the transfer of a valid and binding judgment, and that was sufficient. The presence or absence of a judgment *lien* is immaterial. It was not a lien, but the judgment rendered in September, 1861, that the plaintiffs engaged to assign, and which they did assign, as the consideration for the defendant's undertaking. That was sufficient to relieve the contract from the imputation of being a mere *nudum pactum*.

There is no force in the objection founded upon the assumption that the judgment was divided and assigned to the several transferees in parts. There was no such division. The judgment was assigned *in solido*, the assignees agreeing to pay the amount specified in certain proportions; the defendant's proportion being two-fifths of the whole sum. The arrangement as to the mode and measure of payment constituted no separation of the judgment into parts.

Judgment affirmed. The other judges concur.

STATE OF MISSOURI, Defendant in Error, v. JOHN GRABLE,  
Plaintiff in Error.

1. *Practice, criminal — Change of venue, notice of application for — Not presumed, when.*— This court will not presume that notice of an application for change of venue in a criminal cause was given the prosecuting attorney (Wagn. Stat. 1097, § 19) from the mere fact that the trial court passed upon the application and decided against it, where it does not appear from the record that such attorney was present either to waive notice or to object to its sufficiency.
2. *Practice in criminal cases — Indictment — Court being uncertain where offense was committed, may instruct jury, how.*— In a criminal indictment, the court being in doubt in which of a number of counties mentioned in the testimony the offense was committed, may properly instruct the jury, under the statute (Wagn. Stat. 1087, § 8), to find that the offense was committed in the county over which it had the jurisdiction.

*Error to Fifth District Court.*

*Tutt & Grubb*, for plaintiff in error.

I. Where the record shows, as in this case, that the application was taken up and considered by the court on its merits, the presumption is that all legal preliminary steps, including notice, had been taken. The notice is no part of the application nor of the record.

II. The seventh instruction given by the court is erroneous. Under it the offense may have been committed in Kansas, and yet the jury were bound to find that the offense, if committed at all, was committed in Buchanan county, in the State of Missouri; and furthermore, it is a declaration of the opinion of the court that the defendant is guilty of the offense, and therefore calculated to prejudice the jury against the defendant.

*Johnson*, Attorney-General, for defendant in error.

In the case at bar there is no evidence that any notice was given; and when the record is silent, the court will presume everything necessary to support the decision of the court below. (State v. McCutchin, 5 Mo. 522.)



CURRIER, Judge, delivered the opinion of the court.

At the February term, 1870, of the Buchanan County Circuit Court, the defendant was indicted for murder in the first degree. At his instance the cause was continued to the next succeeding May term of that court. In the course of the May term, the defendant applied to the court for a change of venue, assigning as ground for the change that the judge holding the court was prejudiced against him. The application was verified, presented, and overruled on the same day. A trial was subsequently had, which resulted in conviction. It is now sought to reverse the judgment because of supposed error in the action of the court in overruling the application for a change of venue, and because of a supposed misdirection of the jury in regard to the locality of the alleged offense.

1. The application for a change of venue was by a petition, verified by affidavit, according to the directions of the statute (2 Wagn. Stat. 1097, § 19); but the record fails to show affirmatively that any notice of the application was given to the prosecuting attorney. The statute, *ubi supra*, enacts that "a reasonable previous notice of such application must be given to the prosecuting attorney." That the statute requires the notice indicated, is conceded; but the defendant's counsel insist that notice is to be inferred from the fact disclosed by the record, that the application was "taken up and considered by the court;" that the legal presumption from that circumstance is that "all legal preliminary steps, including notice, have been taken."

The general rule is that legal intendments and presumptions are to be employed in support of the action of the trial court, and not in opposition to it; to cure defects, and not to create error. But we are here asked to presume the existence of facts not appearing upon the face of the record, in order to show that the decision of the trial court was wrong, and that its judgment ought consequently to be overturned.

The statute requires a "previous" notice. The record not only fails to show that notice, or any notice, but it also fails to show that the prosecuting attorney was present when the applica-

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State of Missouri v. Grable.

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tion was taken up and considered by the court, or that he had any knowledge whatever of the proceeding. For aught the record shows, the application was overruled for no other reason than that the attorney was absent, and that notice to him of the application was not shown. The record entry is this: The defendant "files his petition and affidavit for a change of venue in this cause, which, being taken up and considered, is overruled." That is all the record contains, bearing upon the question of notice, and there is nothing to show whether the prosecuting attorney was present or absent at the time. Had the record shown the presence and participation of the attorney for the State, that possibly might have laid the foundation for the presumption that the notice was either given or waived, no objection on the ground of want of notice appearing.

In *Baldwin v. Marygold*, 2 Wis. 419, cited by the defendant's counsel, it appears that the counsel of the adverse party was present in court, and that he opposed the application upon the ground that the notice was insufficient. The court, however, held that, under the statute of Wisconsin, the fact that the application was presented in open court, in the presence of the adverse counsel, constituted a sufficient notice. The record in the case before us fails to show the fact which appears to have controlled the Wisconsin decision. It does not appear that the prosecuting attorney was present, either to waive the notice or to object to its sufficiency.

These notices are treated with liberality, but it is not shown that any appellate court has gone so far as to presume notice, or the presence of opposing counsel, from the mere fact that the trial court passed upon an application and decided against it. In the absence of anything to the contrary, the more reasonable and legitimate presumption in such a case would seem to be that the court acted properly, and that its decision was based on just and legal grounds.

2. The instruction objected to directed the jury, in case they found the other facts necessary to a conviction, "to find that the offense was committed in the county of Buchanan"—the court, so the instruction informed the jury, being in doubt as to the par-

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Tabor v. Missouri Valley R.R. Co. 3 ✓

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ticular county in which the offense was in fact committed. The statute (Wagn. Stat. 1087, § 8) provides that where "there is a matter of doubt, in the opinion of the court, in which of two or more counties the offense was committed, the court of either county in which the indictment is found shall have jurisdiction of the offense." The instruction was founded upon that provision, and told the jury, in effect, that as the court was in doubt as to which of the counties mentioned in the testimony the offense was committed in, the jury should proceed as though the offense was committed in Buchanan county, where the indictment was found. There is nothing here to prejudice the rights of the defendant, or to mislead the jury. In the main the instructions appear to have been satisfactory to the defendant's counsel. The court gave fourteen upon its own motion, and only one of them is objected to. In the mass of matter, it was fortunate that so little appears to attract adverse criticism.

Upon the whole, the defendant appears to have had a fair and legal trial; and the record fails to show cause for a reversal of the judgment on account of the action of the court in overruling the application for a change of venue. In a word, the record fails to show any error in the action of the trial court.

The judgment must therefore be affirmed. The other judges concur.

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DAVID TABOR, Respondent, v. MISSOURI VALLEY RAILROAD COMPANY, Appellant.

1. *Corporations—Railroads—Negligence—Public highways—Citizen may presume what.*—The citizen who, on a public highway, approaches a railroad track and can neither see nor hear any indications of a moving train, is not chargeable with negligence in assuming that there is no car sufficiently near to make the crossing dangerous. He has a right to presume that in handling their cars the railroad companies will act with appropriate care, and that the usual signals of approach will be seasonably given. (*Kennayde v. Pacific R.R. Co.*, 45 Mo. 255, affirmed.)

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Tabor v. Missouri Valley R.R. Co.

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*Appeal from Fifth District Court.*

*Stringfellow & Donohan*, and *Strong & Chandler*, for appellant.

*Pike & Hereford*, for respondent, cited Redf. on Railw. 393; *Huelsenkamp v. Citizens' Railway Co.*, 34 Mo. 34; *Kennedy v. North Mo. R.R. Co.*, 36 Mo. 351.

WAGNER, Judge, delivered the opinion of the court.

Respondent brought his action against the appellant for damages in killing two horses belonging to him, and also for injury occasioned to his harness and wagon in being run over by a train on appellant's track. The accident occurred at a public crossing, and the evidence shows that about dark, on the 10th of September, 1867, the respondent was driving his team slowly across the track; that no trains were due at that hour, and that, as the horses stepped upon the track, the engine of a construction train struck them and killed them both, and did injury to the harness and wagon. It further appears that the train was running very fast, and that the parties in charge of it neither rang the bell nor sounded the whistle before approaching the crossing, as the statute requires.

The court gave three instructions for the respondent. The first told the jury that if they believed from the evidence that respondent sustained injury to his horses, wagon, and harness, by reason of the negligence, carelessness, or mismanagement of the agents or employees of the appellant whilst running or managing a locomotive car or train at the crossing aforesaid, they should find for the respondent.

The second instructed the jury that it was the duty of the appellant to commence ringing the bell or blowing the whistle at a distance of eighty rods from the crossing of the public traveled road, and to keep ringing the bell or sounding the whistle until the locomotive and train had crossed the road, and that if it appeared from the evidence that at the time of the accident no bell was rung or whistle blown, the jury were at liberty to

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Tabor v. Missouri Valley R.R. Co.

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infer negligence or carelessness in the agents or employees of the road, and should find for the respondent, unless they should further find that he, on his part, was guilty of such negligence as contributed directly to produce or cause the injury.

The third instruction declared that if the jury should find that, owing to the train running out of the usual time of trains crossing the public traveled road, and that, owing to the location and construction of the crossing and the topography of the adjacent country, more than ordinary care should have been used by the persons in charge of the train in approaching the crossing, either by lessening the speed or by any other means calculated to avert a collision, and no such care was taken or used, then the jury were authorized to infer negligence on the part of the appellant from such facts, and the respondent was entitled to recover, unless they also believed from the evidence that there was negligence on his part that contributed directly to produce the injury.

The appellant asked five instructions. The court gave the second and fifth, and refused the first, third, and fourth. The second instruction given at the instance of the appellant explicitly stated that although the jury might believe from the evidence that appellant or its agents committed the injury sued for in consequence of negligence on their part, yet unless they further found from the evidence that respondent used such care to avoid the injury as a man of ordinary prudence would have used under similar circumstances, they should find for the appellant, unless they should find that the injury was willfully done.

The fifth instruction declared that, as to what was negligence in the respondent, the jury were to consider and judge from all the circumstances in the case whether a man having charge of a team of horses, and who was about to cross a railroad crossing in the night, above the level of the road he was crossing, where his view of the track and a coming train was intercepted until he got upon the crossing, was not in duty bound to stop and listen, and look up and down the track in both directions before he ventured thereon; and that if they believed the respondent failed to do so, and that if he had done so he



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Tabor v. Missouri Valley R.R. Co.

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could have seen or heard the train coming in time to have avoided the accident, then the jury should find there was negligence on his part; and if there was any negligence or want of care or common prudence on his part which produced or contributed to produce or occasion the injury complained of, they should find for the appellant, unless they should believe from the evidence that appellant willfully produced the injury.

We see no error in the court in refusing the three rejected instructions.

The whole case turned upon a question of negligence, and that is purely a matter of fact to be found by the jury. The evidence is most conclusive that the agents in charge of the train were utterly derelict in their duty in ringing the bell or in sounding the whistle. Whether the respondent was guilty of such negligence as materially contributed to the injury and would exonerate the appellant from responsibility, was submitted to the jury on the most favorable terms for the appellant. The instructions given for the respondent are wholly unobjectionable, and, when taken in connection with those given on the other side, leave the appellant no ground for complaint.

The whole case comes precisely within the principle adjudged in *Kennayde v. Pacific R.R. Co.*, 45 Mo. 255, where we laid down the doctrine that the citizen who, on a public highway, approaches a railroad track, and can neither see nor hear any indication of a moving train, is not chargeable with negligence for assuming that there is no car sufficiently near to make the crossing dangerous; that he has a right to presume that in handling their cars the railroad companies will act with appropriate care and the usual signals of approach will be seasonably given, and that the managers of the train will be attentive and vigilant. A defendant can not impute a want of vigilance to one injured by his act, as negligence, if that very want of vigilance was the consequence of an omission of duty on the part of defendant.

Judgment affirmed. The other judges concur.

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Harness v. Davies County Savings Association.

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CHARLES HARNESS, Defendant in Error, v. DAVIES COUNTY  
SAVINGS ASSOCIATION, Plaintiff in Error.

1. *Bills and notes — Presentment — Request to present again — Waiver.*—The request by the drawer, on maturity of a bill of exchange, to present it again for payment, and the promise that it shall be met, cures all informalities as to presentment and notice, and either admits or waives them.
2. *Bills and notes — Funds in hands of drawee, reasonable expectation as to — Demand and protest.*—Where the drawer of a bill of exchange has failed to place funds in the hands of the drawee to meet it, and has no reasonable expectation that it will be met, demand of payment and protest are unnecessary to hold him.
3. *Bills and notes — Presentment — Demand — Funds in hands of drawee — Consent to present bill second time, no extinguishment of bill, when.*—A., living in Davies county, was in the habit of drawing on B. at New York, without funds in the hands of the drawee, but notifying C., his correspondent at St. Louis, who arranged with B. for payment. In the case at bar, he drew on B. without notifying C. as before, and the bill was dishonored. At A.'s request the holder again sent the bill forward for collection, and it was again protested. After the first protest, C. had deposited funds with B., but had withdrawn them prior to the second presentation, and soon after, C. failed with the funds in his hands. Suit being brought by the holder against A., it was urged that on the first presentment there had been no proper notice or demand to hold the drawer, and that an unreasonable time had elapsed before the second presentment. *Held:*
  1. That A., having made no provision for payment in the first instance, and hence suffering no prejudice from failure of demand and notice, and having no reasonable expectation that the bill would be paid, was liable notwithstanding the want of proper notice to and demand upon A., and that the failure to present it in a reasonable time afterward was immaterial.
  2. That the consent to send the bill forward did not extinguish the original bill. It was neither an extension of the original bill for a consideration nor a payment and satisfaction.
  3. That the deposit with B. was no proper provision for the bill, and that A. was responsible for the withdrawal of the fund.

*Error to Fifth District Court.*

*Hall & Oliver, and McFerran, for plaintiff in error, urged among others the following point:*

The plaintiff in error, by its course of business with the drawee, through the National Banking and Insurance Company of St. Louis, had reasonable cause for believing that its draft would be duly honored and paid upon presentation, and was

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Harness v. Davies County Savings Association.

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entitled to notice on both the first and second presentation of said draft. (Commercial Bank v. Barksdale *et al.*, 36 Mo. 563; Edw. Notes & Bills, 451; Lilley v. Miller, 2 Nott & McCord, 257; 12 Curtis, 250, note.)

*Vories & Vories*, for defendant in error.

I. There was no necessity on the part of the holder of the bill to either put the bill in circulation or present the same for payment. The defendant had no funds in the hands of the firm upon which the bill was drawn; in fact, the defendant had never had any transactions with Kelly & Co. (12 East, 170; 4 M. & Seld. 226; Cathell v. Goodwin, 1 Harris & Gill, 468; 28 Barb. C. C. 390; 1 Pars. Notes & Bills, 451, 544, 548; Edw. Notes & Bills, 598, 606, notes, also side pages 271, 275.) The question is, had defendant prepared for the taking up of this bill, and was he injured by the non-presentation and want of notice? (Dolfus v. Frosch, 1 Denio, 367; Valk v. Simmons, 4 Mason, 113; 17 Wend. 94; 4 Hill, N. Y., 263; Little v. Phoenix Bank, 2 Hill, 425.)

II. After the bill was presented for payment, and dishonored, the defendant, with a knowledge of all the facts, promised to pay the bill, which is *prima facie* evidence of due notice. (Dorsey v. Watson, 14 Mo. 59, 399; Edw. Notes & Bills, 396-8, 423; Chit. on Bills, 326; 23 Wend. 379; Linville v. Welsh, 29 Mo. 203.)

III. There was no consideration for such assent on plaintiff's part to a second presentment, and hence his cause of action being then good against defendant, he neither waived it nor abandoned it. It was merely a nude promise to again present the bill. (1 Pars. Cont. 427-36; Wesson v. Horner, 25 Mo. 81.)

BLISS, Judge, delivered the opinion of the court.

This suit was brought upon an ordinary bill of exchange for \$3,000, drawn by defendants, October 5, 1866, to the plaintiff's order, at sight, upon E. Kelley & Co., of New York city, and the plaintiff recovered judgment, which was affirmed by the District Court.

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Harness v. Davies County Savings Association.

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The petition sets forth the drawing and negotiating of the bill, its various transfers, its due presentation to the drawees for payment, and the protest; also, that after due notice of its dishonor, defendant's cashier requested the plaintiff again to present it, promising to provide means to meet it, but that it was again presented and payment refused. The petition charges that neither at the time the bill was drawn, nor at any time thereafter, had the defendant any funds in the hands of the drawees to meet it. The answer admits the drawing of the bill, but denies the putting it in circulation and its presentment and notice within a reasonable time; alleges that defendant requested the plaintiff again to present the same for payment, but that he failed to present it within a reasonable time thereafter. The answer denies that defendant had made no provision for meeting the bill, and sets up its arrangements in regard to it to show that it had reason to believe the bill would be paid.

It appears that the defendant had no funds in the hands of the drawees, and had no credit with them except as follows: Arrangements had been made with the National Banking and Insurance Company, of St. Louis, to procure a credit with the drawees, and said company had agreed that if defendant would notify them of each draft as drawn, they would at once procure its payment by Kelley & Co.; and it appears that defendant had been in the habit of depositing with said insurance company, of drawing upon said Kelley & Co., and of notifying the company of each draft, and that the latter company at once advised the drawees to pay the same, which drafts were uniformly paid and charged, not to defendant, but to the insurance company. When the bill in suit was sold to plaintiff, defendant's officers failed to notify the insurance company, and the result was that no credit was procured with the drawees; they had no authority to pay it, and it went to protest.

Several technical objections were raised at the trial to the proof of presentation, to the notice, etc. To these objections, even if well taken, it might be sufficient to say that the request to again present the bill, and the promise that it should be met, with knowledge of the facts as appearing both by the pleadings and evidence,

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Harness v. Davies County Savings Association.

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cures all those informalities and admits or waives the presentment and notice. (Clayton v. Phipps, 14 Mo. 399; Dorsey v. Watson, *id.* 59.) But the court gave an elaborate instruction in relation to the defendant's liability in consequence of not having placed funds with the drawee to meet the bills, instructing them upon a supposed state of facts that defendant had no reasonable expectation that funds would be placed there for that purpose.

The general doctrine, that when the drawer of a bill has failed to provide funds to meet it, and has no reasonable expectation that it will be met, demand of payment and notice are unnecessary, is universally received, and we have only to consider whether, under the state of facts developed by the record, they were required in this case; and to arrive at a conclusion, we should first consider the grounds upon which the exception to the rule requiring demand and notice is based, and, second, the various recognized modifications of the exception.

The chief reason given for excusing demand and notice, where there is no fund to draw on, is the fact that the drawer is not prejudiced by their omission. Ordinarily he is supposed to have recourse upon the drawee, upon dishonor of the bill, for the reason that he is supposed to have placed funds in his hands to meet it; and reasonable presentation and demand and prompt notice are required in order to enable him at once to recover back the fund so placed. We must treat defendant's St. Louis correspondent as its agent—though somewhat more than agent—for whose acts no one else is responsible; and it can not be said that by making deposits with such agent, the bill had been provided for. No funds had been placed in the hands of the drawees, and no credit had been obtained for such a bill as this; and when it was returned, the defendant had no resource, and nothing was lost. In the language of Lord Denman, in *Terry v. Parker*, 6 Ad. & El. 502: "If the bill were presented and paid by the drawee, the drawer would become indebted to him in the amount, instead of being indebted to the holder of the bill, and would be in no way benefited by such presentment and payment."

The modifications to the exception to the rule requiring demand



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Harness v. Davies County Savings Association.

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are given in *Dickens v. Beal*, 10 Pet. 577, and the court holds that notice is still required "if the drawer has made, or is making, a consignment to the drawee, and draws before the consignment comes to hand (12 E. 43); if the goods are *in transitu*, but the bill of lading is omitted to be sent to the consignee, or the goods are lost (16 E. 43); if the drawer has any funds or property in the hands of the drawee, or there is a fluctuating balance between them in the course of their transactions (15 E. 221); or a reasonable expectation that the bill would be paid (4 M. & S. 229, 230); or if the drawer has been in the habit of accepting the bills of the drawee without regard to the state of their accounts, this would be deemed equivalent to effects (12 E. 175); or if there was a running account between them (15 E. 221)."

The relations of the drawer and drawees of the bill in controversy do not come within either of those modifications. There was no account between them; the drawer had no such credit as could provide for the bill, and its officers knew it could have it only as procured through its St. Louis correspondent, upon notice; they could have no reasonable expectation that such credit would be procured without notice, and its omission was a negligence that operated equally injuriously upon the plaintiff as though, in the sale of the bill, they had committed an actual fraud. It is unnecessary to say what might have been the reasonable expectation of the drawer if its St. Louis correspondent were alone in fault. But the fault was that of the defendant, in failing to take the essential step provided for, for the St. Louis company could not act without the notice.

The record further shows that after the protest and return of the bill defendant's cashier expressed his regret that it had not been provided for, and requested the holder's agent to again send it forward, promising that funds should be provided to meet it when presented. It was, therefore, sent to the holder in Ohio, and, through the channel in which it had formerly passed, it was again presented to Kelly & Co., and again protested. In the meantime the National Banking and Insurance Company, of St. Louis, had provided the fund to meet it, which remained a few

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Harness v. Davies County Savings Association.

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weeks with the drawees, but it was drawn out by this St. Louis company before the presentation of the bill; and soon after, this company failed with funds of defendant in its hands, most of which are lost. Counsel for defendant claim that there was an unreasonable delay in the second presentation of the bill; that, had it been presented promptly, it would have been paid, and hence that defendant is exonerated from liability. But they can not complain of the action of the court, although the plaintiff might have done so. The jury were directed, in substance, to regard the agreement to present the bill a second time as a good defense, and were told that it should have been presented within a reasonable time. Were we to regard this second presentation in the light of a new bill, and the action of the parties as coming within the requirements of the law merchant, perhaps the instruction was not sufficiently definite as to what would have been reasonable time. So some of the instructions asked and refused might have presented correct propositions of law—we care not to inquire. But these things should not avail the defendant, because the undoubted facts create, as matter of law, a liability on its part. After its indebtedness had become fixed and absolute, the consent to send the bill forward a second time did not extinguish it, nor is there any intimation that the parties so intended. It was neither an extension for a consideration nor a payment or satisfaction. Had the fund to meet the bill been placed and kept in the hands of the drawee, and been lost in consequence of an unreasonable delay in calling for it, it might perhaps be said that if the plaintiff let the matter run an improper period, he took the risk of the solvency of the house where he agreed to take his pay. But the drawer never placed any funds in New York to meet the debt, but trusted the matter to its St. Louis agent, and that agent withdrew the fund before it was called for. The loss which it is said the defendant has suffered was from the misconduct of its own agent—no party to the bill, and wholly unknown to the plaintiff. It would be altogether wrong to charge the plaintiff with such loss.

The other judges concurring, the judgment will be affirmed.

MARY W. BRUNER *et al.*, Plaintiffs in Error, *v.* THEODORE W.  
WHEATON, Defendant in Error.

1. *Contracts, executory, of married women, not absolutely void.*—The executory contracts of a married woman are not absolutely void. They are valid in equity when made on the credit or for the benefit of her separate estate.
2. *Contracts—Proposal, acceptance of, constitutes a binding contract, when.*—In order that an acceptance of a proposition may be operative it must be unequivocal, unconditional, and without variance of any sort between it and the proposal, and it must be communicated to the other party without unreasonable delay.

An absolute acceptance of a proposal, coupled with any qualification or condition, will not be regarded as a complete contract, because there at no time exists the requisite mutual assent to the same thing in the same sense.

3. *Contracts, interpretation.*—In the interpretation of contracts it is a just principle of construction, both morally and legally, that the promisor is bound according to the sense in which he apprehended that the promisee received the proposition.

In construing a contract for the sale of land, in the absence of special words or circumstances indicating a different intent, a stipulation "for immediate payment" or "payment down" will be held to mean payment at the time the deed is made out and executed.

*Error to Fifth District Court.*

Everett & Reed, with whom was Ensworth, for plaintiffs in error.

I. The word "immediately," as used by defendant in his proposition, must be construed to mean immediately after the deed was made, and not immediately after the reception of the letter. The defendant, by the word "immediately," certainly meant a cash payment, or, in other words, a payment when the deed was made, and which are substantially the words in which plaintiff accepted defendant's proposition. It is a well-settled rule of law that the acceptance need not be in the exact words of the offer; if it means the same it is sufficient, no matter how expressed. (1 Pars. Cont., 5th ed., 476.)

II. The plaintiff having complied with the covenants and stipulations on his part to be performed, the contract is an executed contract, and this question of mutuality does not arise in this case; and plaintiff is entitled, even without mutuality of contract,

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Bruner et al. v. Wheaton.

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to specific performance. The rule that contracts must be mutual is not absolute. Where a contract has been performed by one of the parties and not the other, the right to a specific performance remains to the one who has performed his part of said contract.

III. A *femme covert* may take lands by purchase. (Reeves' Dom. Rel., § 118, note 1; Coke on Lit. 352; 2 Blackst. 292; 2 Kent's Com. 150; 1 Blackst. 438; 1 Pars. Cont. 365; 6 Binn. 427; 48 Penn. 382; 40 Penn. 140.)

*Vories & Vories*, for defendant in error.

I. There was no mutuality in the contract set forth in the petition. The plaintiff, Mary Bruner, with whom the contract is alone charged to have been made, being a married woman, could not bind herself by the contract, the performance of which could have been enforced by specific performance as against her. No such enforcement of the contract would or could be made in her favor. In such case the right of action must be reciprocal, and capable of being enforced by each party against the other. (Fry Spec. Perf. 130 *et seq.*, also 198 *et seq.*; also note to same authorities cited.) The only exception to this rule is stated in same book, pages 200-1, (2 Sto. Eq., § 723.) Contracts by married women to pay money are absolutely void. (Bauer v. Bauer, 40 Mo. 61.)

II. There is no contract stated in the petition which could be performed. There is no acceptance of defendant's offer. (Fry Spec. Perf. 136, §§ 167-174; 1 Pars. Cont. 475-7 *et seq.*, and cases cited, and note *a*; Peltier v. Collins, 3 Wend. 459; 1 Sto. Cont., § 387; Eads v. Carondelet, 42 Mo. 113; see also 2 Sto., § 769 *et seq.*, as to what contracts will not be performed.)

WAGNER, Judge, delivered the opinion of the court.

The judgment of the court in sustaining the demurrer makes it necessary to inquire whether the petition sets forth a cause of action. The suit was for specific performance, and the averments in the petition are that the plaintiff, a married woman, occupying certain premises belonging to the defendant in the city of St. Joseph, made proposals in writing to him to purchase the same.

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Bruner et al. v. Wheaton.

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In her first letter addressed to the defendant she states that she had agreed to pay his (defendant's) agent two thousand five hundred dollars for the property—payments to be made in the following manner: fifteen hundred dollars in cash, and the balance, one thousand dollars, in one year, to be secured by mortgage on the premises. To this letter defendant answered that he was willing to let the plaintiff have the property for three thousand dollars, fifteen hundred dollars to be paid to his agent immediately, and the balance in two years, at the rate of seven hundred and fifty dollars a year, with a mortgage on the premises to secure the deferred payments; and he further stated in this correspondence that if the plaintiff accepted the proposition, she should inform him of the fact, and he would send a deed or power of attorney to his agent and authorize him to arrange the whole affair.

Upon the receipt of this proposition, the plaintiff immediately addressed a letter to the defendant stating that she accepted his terms, that she would pay to his agent the fifteen hundred dollars as soon as the deed was ready, and at the same time give the two promissory notes and execute the mortgage as specified in his proposal.

There is a further allegation that an offer was duly made to comply with the terms of the agreement by the plaintiff, that the money had been tendered, and that, relying upon the faith of the contract, valuable improvements had been made upon the premises. Although one of the reasons assigned for sustaining the demurrer was that the plaintiff, being a married woman, had no capacity to contract, yet I think the case is relieved of all embarrassment on that ground, as the contract was made on her private account, and the money was to be paid from her separate estate. About this there is no controversy; the money was hers absolutely, free and independent of all control of her husband.

The case of *Bauer v. Bauer*, 40 Mo. 61, which is mainly relied on, and which appears to have been considered decisive in the determination of this cause, has really no bearing upon it. That was a proceeding to enforce the collection of a general judgment rendered at law on a promissory note against a married woman,



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Bruner et al. v. Wheaton.

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and in accordance with all the authorities we held that it was not maintainable. At law, the general rule is that *femmes covert* have no capacity to do any acts or enter into any contracts, and such acts and contracts are treated as mere nullities. But courts of equity have trenched and broken in upon this doctrine, and have in many respects and under certain circumstances treated the wife as capable of disposing of her own separate property, and of doing other acts as if she were a *femme sole*. The executory contracts of a married woman are not absolutely void. They are valid in equity when made upon the credit or for the benefit of her separate estate. (*Galusha v. Hitchcock*, 29 Barb. 194; *Whitesides v. Cannon*, 23 Mo. 457.)

In *N. A. Coal Co. v. Dyett*; 7 Paige, 9, it is held that "the *femme covert*, as to her separate estate, is considered as a *femme sole*, and may in person, or by her legally authorized agent, bind such separate estate with the payment of debts contracted for the benefit of that estate, or for her own benefit, upon the credit of the separate estate."

She may mortgage her separate estate for her own or her husband's debts, and a power of sale contained in such mortgage is valid. (*Demorest v. Wynkoop*, 3 Johns. Ch. 29; *Kent's Ch.*; see also *M. E. Church v. Jaques*, 17 Johns. 584; *Gardner v. Gardner*, 7 Paige, 112; 22 Wend. 526; *Curtis v. Engel*, 2 Sandf. Ch. 287; *Yale v. Dederer*, 18 N. Y. 265; *Todd v. Lee*, 15 Wis. 365; *Whitesides v. Cannon*, *supra*.)

In my opinion, there can be no doubt of the capacity of the wife to make the contract, and of the equitable powers of the court to enforce it, and therefore there is nothing in the objection of a want of mutuality between the parties.

The next question that arises is whether there was a valid agreement or an acceptance of the proposition according to the terms in which it was made. In order that an acceptance may be operative, it must be unequivocal, unconditional, and without variance of any sort between it and the proposal, and it must be communicated to the other party without unreasonable delay. (*Fry Spec. Perf.*, § 167; *Eads v. Carondelet*, 42 Mo. 113.) To constitute a valid contract there must be a mutual assent of

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Bruner et al. v. Wheaton.

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the parties thereto, and they must assent to the same thing in the same sense; therefore an absolute acceptance of a proposal, coupled with any qualification or condition, will not be regarded as a complete contract, because there at no time exists the requisite mutual assent to the same thing in the same sense. Any words manifesting an *aggregatio mentium* are sufficient to constitute a contract, but the mutual consent—the *aggregatio mentium*—can not, of course, be attained without the assent of both parties.

Now, the proposal was that the defendant would let the plaintiff have the property for \$3,000; she to pay \$1500 to his agent immediately, and the balance in two years, at the rate of \$750 a year, secured by a mortgage upon the property until paid. And he further stated that if she accepted the proposition, she should inform him, and he would send a deed or power of attorney to his agent and authorize him to arrange the whole affair. To this proposition the plaintiff promptly answered that she accepted the terms; that she was ready to pay the \$1500 to the agent as soon as the deed was made, and at the same time execute and deliver the notes and mortgage.

The dry, hard, and technical interpretation is now sought to be given to the proposal, that "immediately" meant that the money should be paid down at the time of acceptance, without waiting for the reception of the deed or the passing of the notes and mortgage. But this is obviously not the sense in which the contracting parties at the time viewed the transaction. It is a just principle of construction, both morally and legally, that the promisor is bound according to the sense in which he apprehended that the promisee received his proposition.

The word "immediately," conveyed in the proposal, simply meant that the first payment should be a cash payment, to be made at the time the deed was delivered and the notes and mortgage executed. Without special words or circumstances indicating a different intent, an immediate payment, or payment down, will mean payment at the time the deed is made out and executed. In this case the payments and the making of the deed, notes and mortgage, are all spoken of in the same connection;

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Hewitt v. Harvey.

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and the conclusion is strengthened by the expression that the defendant, on being notified of the acceptance, would send a deed or power of attorney to his agent and authorize him to arrange the whole affair. That the plaintiff understood the matter in this light, is undisputable, and the defendant had every reason to believe that she so apprehended it. To my mind this is clearly the sense in which the proposition was made and the undoubted sense in which the plaintiff received it, and upon which she acted.

I think, therefore, that the judgment should be reversed and the cause remanded, with directions to the court below to overrule the demurrer. The other judges concur.

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ROBERT A. HEWITT, Appellant, v. LEMUEL HARVEY, Respondent.

1. *Practice, civil—Actions on statute, penalty remedial—Petition must state what.*—It is only necessary for a party wishing to avail himself of a statute which is not purely penal, but is also remedial, to state facts which bring his case within its provisions. It is not necessary to conclude that the act complained of was done contrary to the form of the statute. But all the facts essential to support the action should be alleged, or in substance appear on the face of the petition. (Wagn. Stat. 1345, § 1; Kennayde v. Pacific R.R. Co., 45 Mo. 255.)
2. *Trespass—Action for cutting away timber—Action on statute must set forth what.*—A petition founded on the statute touching trespass for cutting and carrying away timber, which claims more than treble the alleged value of the timber, and fails to state that defendant has no interest or right in the timber carried away, or that it was taken from land not that of defendant, may be sufficient to give a common-law action, but can not be held to be a count on the statute.

*Appeal from Fifth District Court.*

*Strong & Chandler*, for appellant.

I. The petition is sufficient under the statute of trespasses. This suit is not founded on a penal statute, but upon a remedial statute. Though the consequences of the violation are partially punitive, yet the primary object of the law is to give compensation for injuries actually sustained. (13 Pick. 94, 102; Gen. Stat. 1865, p. 661, § 41; *id.* 379, § 1.)

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Hewitt v. Harvey.

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II. This action is upon the first clause of section 1 of the statute (Wagn. Stat. 1345), and under this clause it is only necessary to allege that the land upon which the timber was cut, etc., was the land of another person, and this is done in the amended petition.

III. The damages were properly trebled by the Circuit Court. (17 Mo. 465; 18 Mo. 514.)

*Hall and Vories*, for respondent.

I. Actions on statutes for wrongs done in violation of statutes must conclude "contrary to the form of the statute." (1 Chit. Pl. 373; *Peabody v. Hoyt*, 10 Mass. 36; *Cross v. United States*, 1 Gallison, 36; *Leon v. United States*, *id.* 261; *Lea v. Clark*, 2 East, 333; 13 Wend. 396; *Lowe & Forsyth v. Harrison*, 8 Mo. 351; *Waltham v. Warner*, 26 Mo. 145.) This rule of the common law has not been changed by our practice act, but is continued in force by it. (Gen. Stat. 1865, p. 661, § 41.) In this respect our present statute differs from the act of 1849.

II. The petition in this case is not a good petition under the statute concerning trespasses. A petition under the statute must state "that the defendant had no interest or right in the property taken away, and that it was on land not his own." (8 Mo. 352.)

III. The verdict of the jury in this case does not find the value of the timber cut by defendant, and hence it was error for the court to treble the damages. (*Ewing v. Seaton*, 17 Mo. 465; *Labeaume v. Woolfolk*, 18 Mo. 514; 26 Mo. 145.)

WAGNER, Judge, delivered the opinion of the court.

This was an action for trespass in cutting and carrying away certain timber on land belonging to the plaintiff. In the Circuit Court the jury returned a verdict for the plaintiff, and on motion the court gave treble damages. On appeal, the District Court reversed the judgment and awarded single damages only. From the state of the pleadings, no question can be considered here except the action of the court in reference to damages.

The amended petition on which the cause was tried substantially set forth that the defendant, without leave and wrongfully,

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Hewitt v. Harvey.

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entered upon land of which the plaintiff was owner, and cut down, injured, destroyed, and carried away trees, timber, rails, and wood, standing and growing on the land, to the value of \$400, by which acts of defendant, plaintiff was damaged \$500, and he therefore prayed judgment for \$1500, three times the amount.

The statute upon which defendant attempts to base his claim declares that "if any person shall cut down, injure or destroy, or carry away any tree placed or growing for use, shade, or ornament, or any timber, rails, or wood standing, being, or growing on the land of any other person, \* \* \* in which he has no interest or right, standing, lying, or being on land not his own, \* \* \* the person so offending shall pay to the party injured treble the value of the thing so injured, broken, destroyed, or carried away, with costs." (2 Wagn. Stat. 1345, § 1.)

It is contended by the counsel for the respondent that the petition is manifestly and materially defective as a pleading formed on the statute, and can only be considered as giving a common-law right of action. The ground assumed, that in declaring on the statute it is indispensably necessary to conclude with an averment that the act was done contrary to the form of the statute, we are hardly willing to concede. Such strictness might be required in bringing an action purely for a penalty; but this statute, although penal, is also remedial. Judge Scott, in *Lowe et al. v. Harrison*, 8 Mo. 352, propounds the inquiry whether the words should not be employed in the declaration. But the point was not necessary to the decision of the case, and he does not undertake to decide it.

Judge Napton, in *Waltham v. Warner*, 26 Mo. 141, seems to intimate that that would be the correct mode of pleading; but the question was not expressly passed upon. Chitty, in giving a form of debt for double rent in holding over, inserts the words "against the form of the statute," but says in the note that some of the forms contain this averment, and some do not, without expressing any opinion whether it is necessary or not. (2 Chit. Pl. 495, 5th ed.)

In Massachusetts the statute provided that a party might recover double damages for an injury caused by a defect in a



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Hewitt v. Harvey.

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highway, and the supreme judicial court of that State, after a most full and thorough review of the authorities, held that it was not necessary to allege in the declaration that the injurious act or neglect of the defendant was *contra formam statuti*. (Reed v. Inhabitants of Northfield, 13 Pick. 94.)

It is obvious that our practice act has to some extent changed the rules of pleading in regard to statutes. (2 Wagn. Stat. 1020, § 20.) Accordingly, we decided, in *Kennayde v. Pacific R.R. Co.*, 45 Mo. 255, that it was only necessary for a party wishing to avail himself of a statute, to state facts which brought his case clearly within its provisions, but that all the circumstances essential to support the action should be alleged, or in substance appear on the face of the petition. Tested by the foregoing principles, can the petition in this case be considered as a count on the statute? Under the code, as well as before its adoption, the plaintiff is required to state his cause of action in plain and precise terms, so that there can be no misapprehension as to what he complains of, and what relief he demands.

The only attempted reference to the statute in the petition is where the plaintiff, after stating that the value of the timber was \$400, claimed damages for \$500, and asked that the damages might be trebled, and that he might have judgment for \$1500.

The statute does not permit any such judgment. It allows three times the value of the timber, and no more. In a common-law action, the jury might perhaps give additional damages over and above the actual value of the thing destroyed or carried away; not so, however, on a declaration framed on the statutes. The petition does not state that the defendant had no interest or right in the timber cut and carried away, or that it was taken from land not his own. No facts are stated which, according to the rules of good pleading, bring the plaintiff's case within the provisions of the statute. The petition is sufficient to give a common-law right of action, but is not good under the statute. (*Lowe & Forsyth v. Harrison*, 8 Mo. 351; *Waltham v. Warner*, 26 Mo. 145.)

The judgment of the District Court will be affirmed. The other judges concur.

DAVID PREWITT *et al.*, Respondents, *v.* JAMES BURNETT *et al.*,  
Appellants.

1. *Forceful entry and detainer—Possession sufficient to maintain an action for.*—The fact of previous peaceable possession by plaintiff is all that is necessary to enable him to maintain an action for forcible entry and detainer. Questions touching the right of possession can not be raised in this action.
2. *Forceful entry and detainer—Possession, actual and constructive—Constructive, when sufficient.*—One in actual possession of a part of a tract of land, and holding the whole under claim and color of title, will in law be held to be in possession of the remainder, and actual occupancy thereof will not be necessary to entitle him to action for forcible entry and detainer; and for the purpose of that action the boundaries will be fixed as they are known and recognized, and not as they may be established by actual survey.

*Appeal from Fourth District Court.*

*A. W. Mullins*, for appellants.

I. Agreements in regard to boundary lines, like all other agreements, are of no binding force upon the parties if founded upon mutual mistake in material facts. (*Knowlton v. Smith*, 36 Mo. 507, 513-14; *Menken v. Blumenthal*, 27 Mo. 198, 203-4.)

II. Color of title, with possession of a part of a tract, extends such possession no further than that embraced in the deed showing color of title. It can not include any part of adjoining tracts. (*Cottle v. Sydnor*, 10 Mo. 765 *et seq.*) When a person is in possession of part of a tract of land, with color of title to the whole, he is deemed to be in the actual possession of the whole, because the entry under such deed explains the intention of the party—which would otherwise be uncertain—when he performs the act. (*Hardisty v. Glenn*, 32 Ill. 64.) The fact of such intention to hold, and the claim beyond the actual possession, can be established as well by any other competent evidence as the deed. The courts have even gone so far as to admit the declaration of a party at the time of his entry to show the extent of his possession. (*Hardisty v. Glenn*, 32 Ill. 64; *Blackw. Tax Tit.*, ch. 39, p. 664, ed. 1855.) And when the claim and intent

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Prewitt et al. v. Burnett et al.

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to hold beyond the actual occupancy is shown by any competent evidence, the possession will be extended coextensive with such claim and intention.

BLISS, Judge, delivered the opinion of the court.

The plaintiffs and defendant were adjoining proprietors, and the litigation grew out of an attempt on the part of defendant to re-adjust the boundary line. In 1854 the line was run by the county surveyor, and defendant's grantor, supposing it to have been correctly located, placed his fence upon it, and plaintiff cultivated up to it. In 1869 the defendant procured a re-survey, which placed the dividing line further south, so as to include a strip hitherto in possession of the plaintiffs; and having moved his fence so as to take in the disputed strip, the plaintiff brought his action of forcible entry and detainer, and obtained judgment. Among the questions decided by the court and excepted to by the defendant was the old one so often decided, and always in the same way, to-wit: that previous peaceable possession by the plaintiff, and not the right of possession, is all that is necessary to enable him to maintain this action. Many of the instructions to the jury, asked for by defendant and refused, seem to have been based upon the idea that the correctness of the location of the fence and the right to the possession of the parcel of land between the old and new fence were involved. But those questions, as we have so often held, can not be raised in this form of action. If the plaintiffs were in peaceable possession of this strip of land—whether rightfully or wrongfully does not matter—and if defendants, within three years, forcibly took possession of the same, this action will lie, but only to restore the possession. All questions of title and of right remain as before; and if the present defendant wishes to establish a new boundary line to conform to the last survey, he must initiate proceedings giving to the present plaintiffs the advantage of possession.

A question was raised pertaining to the constructive possession of the plaintiffs before the entry of defendant. The plaintiffs held by deed covering a certain quarter-section which was supposed to include the land in dispute. Defendant claims that this land

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Prewitt et al. v. Burnett et al.

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ought to belong to his farm; that if the line was run correctly according to the last survey, it would be thrown outside the plaintiffs' tract; hence his actual possession of other parts of the tract, with color of title to and claiming the whole, can not include the strip in dispute. But the court held, and held correctly, that this possession extended to the recognized boundaries of the quarter-section. No other position would bear a moment's scrutiny. If the owner and occupier of a farm were to be treated as in or out of possession of that part adjacent to its boundaries, not as they were known and recognized, but as they might be established by different surveys, there could be no such thing as possession of land near a boundary other than by actual occupancy.

The only question on which there is any doubt is embraced in the third and fourth instructions given, and pertains to presumptive possession from previous occupancy. The position of the court is stated rather too broadly in the third, but, as applied to the evidence, it could not have misled the jury. Before the entry of defendant the plaintiffs had been recently in actual occupancy of a small field including the strip in controversy, and the jury were told that if the plaintiffs had at any time before the defendant's entry had possession, it was presumed to continue until such entry unless abandoned. But whether this and the fourth instruction were strictly correct or not is of no importance, as plaintiffs' possession is not made to depend upon previous actual occupancy of the strip in dispute, but upon the fact that it was a part of their farm, whose possession under color of title was undisputed. This, as we have before seen, carried the possession to the boundaries of the farm, whether every portion was inclosed and cultivated or not, and included the parcel in controversy.

The other judges concurring, the judgment will be affirmed.

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State of Missouri v. Lemon.

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STATE OF MISSOURI, Appellant, v. JAMES McD. LEMON,  
Respondent.

1. *Crimes and punishments—Horse-race not gambling device.*—A horse-race is not a gambling device within the meaning of the act concerning crimes and punishments (Wagn. Stat. 502, §§ 17, 18). (*State v. Hayden*, 31 Mo. 35, affirmed.)

*Appeal from Fifth District Court.*

*H. B. Johnson*, for appellant, contended that certain legislation intended for the suppression of horse-racing, by rendering all debts incurred by betting thereon not collectable, might amount to such a constructive prohibition as would render the act punishable by indictment. (2 Bish. Crim. Law, § 591; *State v. Posey*, 1 Humph. 384; *Huff v. The State*, 2 Swan, 279; *Meyers v. State*, 3 Snead, 98.)

No counsel appeared for respondent.

WAGNER, Judge, delivered the opinion of the court.

The defendant was indicted in the Circuit Court of Caldwell county for betting money "upon a game then and there played by means of a gambling device called a horse-race, which was then and there adopted, devised, and designed for the purpose of playing games of chance, for money and property, against the form of the statute," etc.

On motion, the indictment was quashed, and the State appealed. This is an attempt to bring horse-racing within the provisions of the statute against gaming. (1 Wagn. Stat. 502, §§ 16-18.)

The question has been heretofore conclusively settled, and is no longer open to controversy. In the case of *The State v. Hayden*, 31 Mo. 35, it was expressly adjudged that a horse-race was not a gambling device within the meaning of the act concerning crimes and punishments.

Judgment affirmed. The other judges concur.



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McManning et al. v. Farrar et al.

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WM. C. McMANNING *et al.*, Appellants, v. JOHN FARRAR *et al.*,  
Respondents.

1. *Towns and cities—Unincorporated towns—School districts.*—Under section 1, article 2, of the act relating to schools (Wagn. Stat. 1262) an unincorporated town is not legally organized as a school district, and subsequent legislation, explanatory of the meaning of that section, can not retroact so as to alter the previous rights of parties under this law.

*Appeal from Fourth District Court.*

*H. Williams* and *Curtis*, for appellants.

*Gilstrap, A. G. Williams & Eberman*, for respondents.

WAGNER, Judge, delivered the opinion of the court.

The plaintiffs, claiming to be the board of education of the school district of the town of Atlanta, applied to the Court of Common Pleas in Macon county for a *mandamus* against the defendant, who is county clerk, to compel him to assess and extend certain estimates which they had made for school purposes on the tax book. For return to the alternative writ, the defendant stated that he refused to extend the taxes named, for the reason that there was no organized district, as referred to in the writ, and that, therefore, no authority was vested in him to perform the services required. There was a replication to the return, trial, and judgment for plaintiffs awarding a peremptory writ, from which defendant appealed to the District Court, where the judgment was reversed, and the action of that court is now brought here for review.

Whether the town of Atlanta was legally organized as a school district under the statute authorizing cities, towns, and villages to organize for school purposes, with special privileges, is the only question. It is agreed that the town was not incorporated at the time the proceedings attempting an organization took place.

The law under which the power is claimed is as follows: "Any incorporated city or town in this State, plat as laid out and recorded with the territory attached or hereafter to be attached to

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State of Missouri ex rel. Moore, by guardian, v. Sandusky et al.

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said city, town, or village for school purposes, may be organized into and established as a single school district, in the manner and with the powers hereinafter specified," etc. (2 Wagn. Stat. 1262, § 1.) By the very terms of the act the power to organize in this mannner, with special privileges, was limited to incorporated towns; and the town of Atlanta not being incorporated, its citizens could not avail themselves of its provisions. The section is plain and unambiguous, and there is nothing for the courts to construe. Their only province and function is to give effect to the law as it is written. The subsequent legislative enactment, explanatory of the meaning of the section, can not retroact so as to affect the rights of the parties in this proceeding.

Judgment affirmed. The other judges concur.

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STATE OF MISSOURI *ex rel.* W. W. C. MOORE, BY GUARDIAN,  
ETC., Respondent, v. SAMUEL D. SANDUSKY *et al.*, Appellants.

1. *Practice, civil—Amendment of caption to petition, when ground for reversal.*—The action of court in allowing an amendment to the caption of a petition after the evidence is in, is a matter resting very much within its sound discretion, and would be no ground of reversal unless shown to operate very much to the prejudice of the other party.
2. *Bonds—Person named in body of, not signing—Effect as to release of signers.*—Those signing a bond will be bound by it, notwithstanding the fact that another person named in the instrument had failed to sign it, unless it appear that at the time of its execution it was agreed that it should not be delivered as their deed until all had executed it.
3. *Bonds—Penalty—Damages greater than, not recoverable.*—The general principle is that in actions upon penal bonds with collateral conditions, the plaintiff can never recover more in the shape of damages than the penalty, even where the damages exceed the amount of the penalty; nor in such case can interest be recovered even on the penalty, after happening of the breach, if the penalty be not then paid. But under the statute (Wagn. Stat. 240, § 8) he may in addition have costs which accrued in prosecution of his suit on the bond.
4. *Bonds, penal—Sureties, liabilities of can not be extended by implication.*—The liability of a surety on a bond can not be extended by implication beyond the terms of his contract. To the extent and in the manner and under the circumstances pointed out in his obligation, he is bound, and no further.

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State of Missouri ex rel. Moore, by guardian, v. Sandusky et al.

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*Appeal from Fourth District Court.*

*Burgess*, for appellants.

The judgment is excessive. In no case could it have been rendered against the securities for more than the amount of the penalty in the bond. (Gen. Stat. 1865, p. 605, §§ 8-10; *id.* 607, § 28; *Farrar & Brown v. United States*, 5 Pet. 372; *People v. Sumner*, 16 Ill. 174; *Robinson v. County Commissioners*, 5 Gilm. 559; *Skinner et al. v. Phillips, Sheriff*, 4 Mass. 68; *Sedgw. Meas. Dam.* 425; *Fairly v. Lawson*, 5 Cow. 424.) The release of the principal, Carter, and one of the securities, Hoyle, operated as a discharge of all the securities. (State, to use of *Midgett v. Matson, Adm'r of Mills*, 44 Mo. 305; *Routon's Adm'r v. Lacy*, 17 Mo. 399; *Dodd v. Winn*, 27 Mo. 501; see also 22 Ind. 405; 4 Watts, 21; 17 Mass. 605; 11 Metc. 35, 36; 2 Am. Law Reg. 34; 7 Am. Law Reg. 93; 2 Gray, 557; 2 Pick. 26; 9 Wheat. 702; 32 N. Y. 448; 24 Ind. 484-6; *Wells v. Dill*, 1 Martin, 592; *Pauling v. United States*, 2 Cranch, 219.)

*Geo. W. Easley*, for respondent.

I. The breach of the bond in this case made the penalty a debt, which the surety could at once have discharged by payment; but as payment was not then made, the surety is held for interest from the time of the breach. (*Carter v. Thorn et al.*, 18 B. Monr., Ky., 613; *Carter v. Carter*, 4 Day, Conn., 30; *Brainard v. Jones*, 18 N. Y. 25; *Harris v. Clapp*, 1 Mass. 308; *Burr v. Wilcox*, 22 N. Y. 557; *Huntington v. Mott*, 1 Root, Conn., 423; *Graham v. Bickham*, 4 Dallas, Penn., 149; *Hughes v. Wickliff*, 11 B. Monr., Ky., 202; *United States v. Arnold*, 1 Gallison, 348, affirmed in 9 Cranch, 108; *Maryland v. Wyman*, 2 Gill & Johns. 254-79.)

II. This court will not review the discretionary power of the Circuit Court in allowing the amendment in the caption of the petition, especially when it is not made to appear that the appellants were injured thereby.

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State of Missouri ex rel. Moore, by guardian, v. Sandusky et al.

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III. There being no condition or reservation on the part of Halliburton in the execution of the bond, and no fraud practiced on him, he is bound, although he may have expected Grill to sign the bond. (4 Shepley, Me., 140; 10 Mass. 442; 5 Greenl., Me., 336; 4 Cranch, 210.)

WAGNER, Judge, delivered the opinion of the court.

The objections urged to the sufficiency of the petition will not be particularly noticed here. That the second amended petition on which the cause was tried was inartistic and artificial is undoubted, but it was substantially good after verdict, and unless some error in the ruling of the court below, involving the merits, appears, the judgment will not be disturbed. The action of the court in allowing an amendment to the caption of the petition after the evidence was in, was a matter resting very much within its sound discretion, and we should have to see that it operated clearly to the prejudice of the appellants before we would reverse on that ground. The amendment only made the petition conform to the facts adduced in proof; and as to whether any terms should have been imposed was primarily in the discretion of the trial court, and we will not interfere unless abuse is apparent.

There are two questions presented in the record for our determination: first, whether Halliburton was bound on the bond; and, second, whether the court erred in giving damages beyond the amount of the penalty.

The action was commenced on an official bond against Carter as principal, and Sandusky, Hoyle and Halliburton as securities. The bond was for the penal sum of four thousand dollars, and conditioned that Carter should faithfully perform his duty as guardian and curator, etc. In the body of the bond the name of Carter was inserted as principal, and Sandusky, Grill, Hoyle and Halliburton as securities. The bond was signed by Carter, Sandusky, Hoyle and Halliburton, the name of Grill not appearing. It is now contended that because Grill did not sign the bond it is void as to the other securities; that his name appearing in the writing amounted to an undertaking that he should sign it as one of the securities, and that his failure to do so vitiated it and released the other securities.

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State of Missouri ex rel. Moore, by guardian, v. Sandusky et al.

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This is a question upon which the authorities are greatly in conflict, respectable courts having decided in directly opposite ways.

It would subserve no useful purpose to go into a general review of the cases, as it is almost impossible to harmonize or to extract any very general or satisfactory rule from them. We think that the best and most intelligible principle is, that where a writing obligatory is prepared to be signed by several and is not signed by all, whether it is the act of those who do sign it depends upon the question whether it was signed and delivered as an escrow only until signed by the others, or was delivered as the writing of the parties signing. It seems to me that about the best rule was laid down by the Supreme Court of Massachusetts in *Cutter v. Whittemore*, 10 Mass. 442. There the bond was written to be executed by three parties, and it was executed but by two of them. Jackson, J., in delivering the opinion of the court, said: "If there had been any agreement or condition at the time, that it should not be delivered as their deed unless the third person named as obligor should also execute it, this would show that it was delivered as an escrow." In the absence of such evidence it was decided to be binding upon those who did execute it.

Assuming this to be the correct doctrine, Halliburton, who is the only party appealing in this case, is not in a situation to complain. The only real defense which he interposed was a denial of his signature to the bond, which is clearly disproved by the record. There is no averment in his answer that the bond was delivered as an escrow, or that there was an agreement that it should not be valid and binding as to him until the signature of Grill should be procured. And had such a defense been set up, there is not a shadow of evidence to sustain it. This point must therefore be ruled against the appellant.

The next question relates to the action of the court in assessing damages. The petition was defective in not asking for judgment for the penalty of the bond and assessment of damages for the injury sustained; but advantage was not properly taken of it in the Circuit Court, and the court proceeded to render a general judgment for the amount that it considered the plaintiff



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State of Missouri ex rel. Moore, by guardian, v. Sandusky et al.

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entitled to, which made the sum of \$4,580. This amount was ascertained by taking the sum due by the guardian at the date of the breach, and calculating interest thereon up to the day of the trial.

The District Court, to conform to the statute, modified the judgment so as to give judgment for the penalty of the bond, \$4,000, but adopted the Circuit Court's assessment of damages, and authorized execution to issue for the whole damages so found.

In *Carter v. Thorn*, 18 B. Monr. 613, it was decided that upon the breach of the condition of a penal bond the penalty becomes, in law, a debt due; and the obligors can discharge themselves from liability on the bond, when the damages resulting from the breach of condition exceeds the penalty, by the payment of the penalty alone. But if the damages in such case be not paid on the happening of the breach, it will bear interest until it is paid. A similar decision was made in *Hughes v. Wickliff*, 11 B. Monr. 202, overruling previous decisions in the same court. To the same effect are *Brainard v. Jones*, 18 N. Y. 35, and *Carter v. Carter*, 4 Day, 30. But the general principle is that in actions upon penal bonds with collateral conditions, the plaintiff can never recover more in the shape of damages than the penalty. (2 Wash. C. C. 142; *Clerk v. Bush*, 3 Cow. 151; *Fairlie v. Lawson*, 5 Cow. 424; *Branscombe v. Scarborough*, 6 Q. B. 13; *Balsley v. Hoffman*, 13 Penn. St. 603; *Farrar v. Christy*, 24 Mo. 474; *Crawford v. Woodward*, 8 Mo. 353; 1 Tuck. Com., book 2, ch. 17, p. 269.)

Upon this subject the Supreme Court of the United States say: "The parties, plaintiffs in error, are the sureties, and it is perfectly clear that as to them a judgment can not be rendered beyond the penalty, to be discharged on payment of what is actually due, which, of course, can only be where it is a sum less than the penalty." (*Farrar v. United States*, 5 Pet. 373.)

No principle is better settled than that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent and in the manner and under the circumstances pointed out in his obligation, he is bound, and no further.

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Risley v. Andrew County.

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The statute provides that judgment may be entered for the penalty of the bond, together with costs (1 Wagn. Stat. 240, § 8), and the costs that may accrue in the prosecution of a suit we think are all that can be allowed in addition to the penalty, even where the damages exceed the amount of the penalty.

In the proceedings in the Circuit Court the suit was dismissed as to Carter and Hoyle, and prosecuted to final judgment against Sandusky and Halliburton, but the District Court seems to have rendered judgment against all the parties. As the whole case is disposed of by this opinion, and there is nothing requiring a new trial, this court will give the judgment that the court below should have given. It is therefore ordered that the judgment of the District Court be reversed, and that judgment be entered in this court for \$4,000, the penalty of the bond, in favor of the plaintiff, against Sandusky and Halliburton only; and as all the evidence shows that his damages exceed that sum, execution will issue for the full amount of the penalty. The other judges concur.

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SMITH RISLEY, Respondent, v. ANDREW COUNTY, Appellant.

1. *Revenue, county — Contract — Interest.* — A contractor with a county for the building of a bridge would be entitled to interest on payments deferred after his fulfillment of his contract.

*Appeal from Fifth District Court.*

This was originally an application made in May, 1869, by respondent, to the County Court of Andrew county for payment of an amount alleged to be due him for building a certain bridge in said county. The County Court found there was then due respondent \$2,150, and accordingly issued warrants for that sum. Respondent then filed an account giving the county credit for said warrants, and claiming interest on the amount of the warrants. The County Court rejected this claim for interest, and respondent appealed to the Circuit Court of Andrew county.

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Risley v. Andrew County.

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*Strong and Hedenburg*, for appellant.

I. Respondent accepted said warrants in settlement of the claim. This settlement estops respondent, and was a waiver of interest. (8 Mo. 41, 43; 1 Esp. 110; 3 Johns. 229; 13 Wend. 639; 2 N. H. 169; 15 Wend. 76; 11 Paige, 142; 3 Cow. 86; Chit. Cont. 642-3, note 1; Broom's Leg. Max. 373.)

II. The whole record shows that respondent's claim was on an account for work and labor done, and not an instrument of writing. He must, therefore, to enable him to recover interest, show either a demand and refusal to pay or a liquidation of his account, neither of which he has done. (Gen. Stat. 1865, ch. 89; 15 Johns. 409; 1 Am. Lead. Cas. 341; 3 Cow. 387; 5 Cow. 587; 2 Cush. 475.)

*Heeren & Rea*, for respondent.

WAGNER, Judge, delivered the opinion of the court.

I think the judgment in this case is clearly for the right party. The county adopted the written contract entered into by Bonham, its road commissioner, and ought to be bound by it. By the terms of the contract Risley was to be paid as soon as he completed the bridge. The court paid him a part when he fulfilled his contract, and then nearly two years elapsed before he received any further compensation. At that time the court delivered him warrants for the principal remaining due, but refused his demand for interest.

In my opinion he was justly entitled to the interest he claimed, and the judgment will therefore be affirmed. The other judges concur.

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Carter et al. v. Black.

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MILTON W. CARTER *et al.*, Defendants in Error, v. F. S. BLACK,  
Plaintiff in Error.

1. *Practice, civil—Pleading—Warranty, what amounts to.*—A petition substantially sets out a cause of action for a warranty which shows a representation or positive and unequivocal affirmation by defendant as to the state and quality of the thing sold, on the faith of which plaintiff made the purchase and paid the consideration. The word "warrant" need not be set out, or any other particular phraseology, in order to constitute a warranty.

*Error to Fourth District Court.*

Geo. W. Easley, for plaintiff in error.

This is an action for deceit, and not an action on the breach of warranty. (1 Smith's Lead. Cas. 207, note 211, and cases collected; Hill. Sales, 287, § 35 and notes; 1 Wheat. Selw. 482; 1 Bac. Abr. 11.)

G. D. Burgess, for defendants in error.

WAGNER, Judge, delivered the opinion of the court.

This suit was instituted by the plaintiffs to recover damages from defendant for a breach of warranty, and for fraud practiced upon them in the sale of two horses. The petition alleged that the defendant represented the horses to be sound and free from disease, and that upon that representation they relied, and by reason thereof they were induced to purchase. The answer was a denial; judgment for plaintiff. The only ground insisted on for a reversal is that the court below treated the action as arising on a warranty, when the petition shows that it was a case of deceit.

Prof. Parsons, in treating on the subject of warranty, says that any distinct assertion or affirmation of quality made by the owner during a negotiation for the sale of a chattel, which it may be supposed was intended to cause the sale, and was operative in causing it, will be regarded either as implying or as constituting a warranty. If such affirmation were made in good faith, it is still a warranty; and if made with a knowledge of its falsity, it is a warranty, and it is also a fraud.

It is certain that the word "warrant" need not be used, nor any other of precisely the same meaning. It is enough if the words actually used import an undertaking on the part of the owner that the chattel is what it is represented to be, or an equivalent to such undertaking. (1 Pars. Cont. 579-80.) Mr. Hilliard (Hill. Sales, 258, § 6), in the second edition of his work, lays down the doctrine that with regard to the words necessary to a warranty, the word "warrant," or any other particular phraseology, is not necessary to constitute a warranty. It is sufficient if there be a representation of the state of the thing sold, or a direct, positive, unequivocal, and express affirmation of its quality and condition, being part of the consideration of the sale, and showing an intention to warrant or make good the quality of the thing sold, and so understood and relied upon, instead of a mere recommendation or expression of an opinion, leaving the buyer to understand that he must still examine and judge for himself; more especially if the subject is within the particular knowledge of the vendor; and the question is for the jury, under the advice of the court. This position he sustains by a large number of adjudged cases.

The petition substantially set out a cause of action as for a warranty, according to the above and foregoing principles. It shows an affirmation or representation upon the faith of which the horses were purchased and the consideration paid. And it negatives entirely the idea that these affirmations or representations were intended as mere recommendations or expressions of opinion, leaving the buyers to understand that they must examine and judge for themselves. But upon this point the case was fairly submitted to the jury under instructions from the court. The only error that we have discovered in the record is in giving instructions entirely too favorable for the defendant.

The judgment is clearly for the right party, and must be affirmed. The other judges concur.



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Andrew County v. Owens.

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ANDREW COUNTY, Defendant in Error, v. AMOS F. OWENS,  
Plaintiff in Error.

1. *Revenue—County collector—Failure to pay amount found in arrears, or to comply with order of court—Construction of statute.*—A county collector found in arrears by the County Court, and failing to comply with the order of court issued pursuant to statute (Wagn. Stat. 412, § 22), for the payment of the amount due, or to appear at the first day of the next term, to protect his rights (§§ 23-4), has no appeal from a judgment of court thereupon rendered against him for the amount in default. (See generally sections 19 *et seq.*)

*Error to Fifth District Court.*

*Kelly, Davis & Giddings*, for plaintiff in error.

I. It has always been conceded that in cases like the one at bar an appeal would lie; and the only question has been whether the appeal operated as a *certiorari* or writ of error, or whether the case could be tried *de novo*. (County of Boone v. Corlew, 3 Mo. 10-12; County of St. Louis v. Sparks, 11 Mo. 201; Lewis v. Nicholls, 26 Mo. 278; Lacy v. Williams, 27 Mo. 280; County of St. Louis v. Lind *et al.*, 42 Mo. 348; Foster *et al.* v. Dunklin, 44 Mo. 216.) The Circuit Court did not try this case either upon the record or *de novo*, but dismissed the appeal without a hearing in either mode. His failure to appear on the first day, or before the judgment, might preclude him from setting up a defense in the County Court of extraneous matter—matters not apparent on the face of the record—but it could not preclude him from appealing nor from resisting the correctness of the decree or judgment for error, apparent on the face of the claim or record.

II. It was not necessary, in this case, for plaintiff in error to move or appear before the judgment was rendered in order to entitle him to an appeal; nor is it necessary to move to set aside a judgment by default in the County Court at all, in order to an appeal.

*Strong & Chandler*, for defendant in error.

WAGNER, Judge, delivered the opinion of the court.

There is but one question presented by this record for our consideration, and that is the action of the Circuit Court in dismiss-

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Andrew County v. Owens.

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ing the appeal from the County Court. Owens, it seems, was formerly the collector of the revenue of Andrew county; and at the May term, 1869, of the County Court of that county, the court alleged that he had failed to make his settlements at stated terms, as the law required; and they proceeded to adjust his accounts, and found a balance due the county. An order was then entered of record commanding him to pay the amount so found due, to the county treasurer within ten days after a copy of the order should be served upon him. This he failed to do, and at the next succeeding (August) term the County Court proceeded to render judgment against him for the sum found due on settlement, together with the statutory penalty. At the October adjourned term, it being a continuation of the regular August term, Owens appeared and moved the court to set aside the judgment and open up the settlement for certain reasons alleged in his motion, which being overruled, he appealed to the Circuit Court. In the Circuit Court the county, by its attorney, appeared and moved to dismiss the appeal because the defendant did not, on the first day of the next term of the County Court after the adjustment of his accounts, show cause why judgment should not be rendered against him, and because no appeal was allowed by law in this case. The Circuit Court sustained the motion; and an affirmance being had in the District Court, Owens sued out his writ of error. The proceedings were had under the statutes prescribing the duties of collectors and other officers who are chargeable with moneys belonging to any county. (1 Wagn. Stat. 412, § 19 *et seq.*)

The nineteenth section makes it the duty of the officers named to settle with the County Court at each stated term thereof, and pay the balance which may be due the county into the treasury. The twentieth, twenty-first, and twenty-second sections provide that if the person chargeable shall refuse to render true accounts or to settle, the court shall proceed to adjust the accounts of such delinquent according to the best information they can obtain, in which case the court may refuse to allow any commissions to the officer in default, and may, moreover, without delay, order him to pay into the county treasury the balance found due; and if he

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Andrew County v. Owens.

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does not pay the amount thereof and produce to the clerk of the County Court the treasurer's receipt therefor, within ten days after the balance is ascertained, it is then made the duty of the county clerk to charge him with ten per cent. on the amount due.

Section 23 declares that unless the delinquent appear on the first day of the next succeeding term, and show good cause for setting aside such settlement, the court shall enter up a judgment for the amount due, with thirty per cent. per annum until paid, and issue execution therefor. But the twenty-fourth section further provides that if good cause be shown for setting aside the settlement, the court may re-examine the accounts, settle and adjust the same according to law, and, in their discretion, remit the penalties imposed.

As the proceedings are in the first instance *ex parte*, it was not intended to deprive the delinquent of the privilege of appearing and presenting his claim to relief. For that purpose the law requires him to appear on the first day of the next succeeding term, and unless he does so, and shows good cause for setting aside the settlement, then judgment goes against him, with an additional penalty. If he complies with the law and makes his appearance, the accounts may be re-examined and the penalties remitted. Owens was duly notified, and paid no attention to the order of the court or the requirements of the law. Two months elapsed before he supposed that his case was worth attending to. The law specially fixes the period at which he was bound to appear to protect his rights, and we have no power to extend the time. If an appeal would lie at all in the case, in order to avail himself of it, it was incumbent on him to appear on the first day, as the law directs, and take the proper steps in that behalf. Parties can not wholly disregard the law, and then ask for relief at their own pleasure.

We are unable to distinguish this case from the principle that obtains in appeals from justices' courts on judgments by default. When a judgment is rendered before a justice of the peace by default, the defendant must appear before the justice within ten days and move to have the same set aside. If he does not so appear he forfeits his right of appeal; and if he appeals, his

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Collins v. Saunders.

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appeal will be dismissed. There he must act within ten days; here he must move on the first day of a stated term. It is evident that the defendant has mistaken his remedy, and that he must pursue another course.

The other judges concurring, the judgment will be affirmed.

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LEWIS H. COLLINS, Appellant, v. JAS. W. SAUNDERS, Respondent.

1. *Practice, civil — Bill of exceptions — Motion for new trial and arrest of judgment.*—Where defendant appeals without motion for a new trial, or in arrest of judgment, this court is limited to questions arising on the face of the record, and will not consider those presented only by bill of exceptions.

*Appeal from Fourth District Court.*

*Mullen*, for appellant.

*Burgess*, for respondent.

There was no motion made in the Circuit Court for a new trial, or in arrest of judgment, and where this is the case this court has repeatedly held that it will not review the proceedings of the court below. (*Morgner v. Kister*, 42 Mo. 466; *Banks v. Lades*, 39 Mo. 406; *Bishop v. Ransom*, 39 Mo. 416-17; *Long v. Towle*, 41 Mo. 398; *Richmond's Adm'r v. Pogue*, 36 Mo. 313; *State v. Marshall*, 36 Mo. 400.)

CURRIER, Judge, delivered the opinion of the court.

The plaintiff brings this cause here by appeal, first from the Circuit Court and then from the District Court, but without having filed in the trial court any motion in arrest or for a new trial. This court is therefore limited in its range of investigation to questions arising upon the face of the record proper; that is, it will not consider questions which are alone presented by the bill of exceptions. The point of practice thus stated was care-

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Collins v. Saunders.

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fully considered in *State v. Marshall*, 36 Mo. 400, and the rule as given above was declared to harmonize with and carry out the purposes of the statute. (R. C. 1855, p. 1286, § 6; Wagn. Stat. 1059, § 6.) Subsequent decisions have conformed to the ruling in the case referred to, and the rule of practice there enunciated must now be regarded as settled, although a different rule prevailed under the practice act of 1849. As to the distinction between errors appearing of record and errors appearing by exceptions, see *Bateson v. Clark*, 37 Mo. 31. But the plaintiff seeks by his appeal to raise questions which do not appear upon the face of the record, and which are alone presented by the bill of exceptions. The Circuit Court, upon the defendant's motion, struck out an important part of the plaintiff's petition; and that is the error complained of, and the facts are presented in a bill of exceptions.

The petition was a part of the record proper, but the defendant's motion to strike out and the subsequent proceedings thereon were not; and these were matters which could alone be presented by a bill of exceptions, and they were accordingly presented in that way.

The plaintiff having neglected to file a motion for a new trial, thus giving the trial court an opportunity to review its own decision, the merits of the question he now seeks to raise can not be investigated or declared in this proceeding. That can only be reached by a suit which shall develop the equities sought originally to be asserted here, and which were asserted in the original petition, but which were cut out of the case by the action of the court.

The judgment must be affirmed. The other judges concur.



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McCloon v. Beattie, garnishee.

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HENRY P. MCCLOON, Respondent, v. ARMSTRONG BEATTIE,  
GARNISHEE, ETC., Appellant.

1. *Justices' courts—Attachment—Garnishment—Jurisdiction of justices' courts not presumed.*—The return of a constable, on order of publication issued in an attachment proceeding before a justice of the peace, showing that the same was executed by "posting in four public places," etc., but not that it was posted twenty days before the day when defendant was obliged to appear (Wagn. Stat. 196, § 77), gave the justice no jurisdiction over the defendant. Judgment based on such a notice would be simply void, and would not sustain a judgment against a garnishee.

The jurisdiction of inferior courts will not be presumed, and must be proved.

*Appeal from Fifth District Court.*

*Bassett, Van Waters & Pike*, for appellant.

No court can rightfully render judgment in a cause until it has acquired complete jurisdiction over the parties, the subject-matter and the process. Judgment rendered without such jurisdiction is void. (Penobscot R.R. Co. v. Weeks, 52 Me. 456; Sanders v. Rains *et al.*, 10 Mo. 770; Caldwell v. Lockridge, 9 Mo. 368; Bigelow v. Stearns, 19 Johns. 39; Smith v. Rice, 11 Mass. 507; Corwin v. Merritt, 3 Barb. 345; 26 Conn. 273; Smith v. McCutchen, 38 Mo. 416; 12 Ill. 358.) The record of inferior courts should affirmatively show jurisdiction. (Burch v. Schneider, 27 Mo. 101; State v. Metzger, 26 Mo. 65; 9 Wheat. 541; 6 Mo. 64, 74; Frees v. Ford, 2 Seld. 176; 2 How. 309; 11 Wend. 648, 653; 1 Hill, 130; 3 Mo. 302.)

*Strong & Chandler*, for respondent.

BLISS, Judge, delivered the opinion of the court.

The plaintiff sued out before a justice of the peace of Buchanan county a writ of attachment against one Austin, and summoned defendant Beattie as garnishee. Beattie appealed to the District Court from the judgment rendered against him, when again the plaintiff recovered judgment, and the case is brought here after an affirmance by the District Court.

The record is attacked for various errors and irregularities both

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McCloon v. Beattie, garnishee.

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before the justice and in the Circuit Court; but we will only consider one. It does not appear that the debtor, Austin, was ever brought into court. He was not found, and never appeared, and the return of the constable to the order of publication shows that it was "executed by posting in four public places," etc. This is no execution of the order. The return should have shown that the notices or advertisements were posted up in four public places in the proper county, twenty days before the day when the defendant is notified to appear; and it is sufficient if the correct period appears by the officers specifying the time when the notices were posted. But it must affirmatively appear that the notice has been given according to law, or the justice obtains no jurisdiction over the absent debtor. "Jurisdiction will be presumed as to courts of general authority, but as to inferior courts it is different, and those who claim rights or exemptions under their proceedings must show their jurisdiction." (State to use, etc., v. Baldwin, 27 Mo. 103; State v. Metzger, 26 Mo. 65.) No jurisdiction having been obtained of the person of Austin, the judgment against him is simply void, and can not sustain a judgment against a garnishee, and such judgment would be no defense if pleaded to a new action upon his supposed indebtedness to Austin.

Irregularities in obtaining the judgment against the principal debtor, provided jurisdiction is obtained of the person and subject-matter, will not vitiate that against the garnishee, and the former judgment will protect him in a new action. Mr. Drake states the point with great force: "It follows hence that a garnishee must, for his own protection, inquire first whether the court has jurisdiction of the defendant, and next whether it has jurisdiction of him. If the jurisdiction exists as to both, he has no concern as to the eventual protection which the judgment of the court will afford him; it will be complete." (Drake's Attach., § 695.) The defendant Beattie, then, has a right to complain of the judgment against him, and to seek its reversal, although he stands indifferent between the parties.

The justice never acquired jurisdiction; his judgment is reversed. The other judges concur.

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Markle v. Langner.

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'S. M. MARKLE, Defendant in Error, v. ERNEST LANGNER,  
Plaintiff in Error.

1. *Practice, civil*—*Supreme Court will not weigh evidence.*—In law cases the Supreme Court will not undertake to weigh the evidence.

*Error to Fifth District Court.*

*May*, for plaintiff in error.

*Pike*, for defendant in error.

WAGNER, Judge, delivered the opinion of the court.

Plaintiff brought his action against the defendant to recover the sum of \$105 as commissions alleged to be due him by agreement for selling a certain piece of real estate for the defendant. Defendant's answer contained a denial of all the allegations set forth in the petition, and also set up as new matter that he had no interest in the land, and that he was only an agent for the sale of the same, and that of this the plaintiff knew and was advised.

On motion of the plaintiff the court struck out all that part of the answer which referred to the new matter. To this action of the court no exception was taken. By agreement of the parties the cause was then submitted to the court, without the intervention of a jury, and a finding was had for the plaintiff.

It is a matter of some surprise, in view of the prior rulings of this court and the well-established law of this State, that this cause was ever brought here. There is not a single point of law saved, no exception was taken to any action of the court below, and the case stands here upon the naked evidence. It would seem that we have sufficiently often repeated the remark that we will not undertake to weigh the evidence. So far from being the fact, as argued here, that there is no evidence to sustain the verdict, we are inclined to the opinion that the preponderance of the evidence is in its favor. But upon this discussion we will not enter.

A motion was made for a new trial on the ground of newly-discovered evidence, which was overruled. In this we see no error. The papers wholly fail to show that the defendant exercised the

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Barrow et al. v. Davis et al.

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proper diligence in attempting to procure the evidence; besides, at best it only tended to weaken or disparage the statements of one of the witnesses in the cause.

The judgment will be affirmed. The other judges concur.

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G. W. BARROW *et al.*, Appellants, *v.* JOHN W. DAVIS *et al.*,  
Respondents.

1. *Revenue—School taxes, collection of—Injunction to restrain, contains no equity.*—A bill for injunction to restrain a county collector from collecting school taxes alleged to have been irregularly and fraudulently levied, contains no equity, and should be dismissed. If the assessment be void it will not protect the officer, nor will a sale under it divest the plaintiff of his property. The wrong can be fully compensated, and the injury is not in any sense irreparable.

*Appeal from Fourth District Court.*

*Barrows, pro se*, cited 13 Johns. 444; 7 Wend. 89; 16 Wend. 607; 1 Paige, 90; 1 Johns. Ch. 131; 1 Barb. Ch. 189; 4 Johns. Ch. 339, 556, and authorities cited; 3 Sandf. 463; 4 Paige, 399; 2 Paige, 509; 2 Seld. 147; 1 Paige, 333; 1 Johns. Ch. 28; 6 Paige, 83; 17 Johns. 388; 9 Mo. 273, 336; 13 Mo. 321; 22 Mo. 90; 23 Mo. 443; 24 Mo. 20.

Respondent filed no brief.

WAGNER, Judge, delivered the opinion of the court.

Plaintiffs filed their bill in the Macon County Circuit Court, praying for an injunction to restrain Forbes, the collector of the revenue, from the collection of certain school taxes which they alleged were irregularly and fraudulently levied. The court dismissed the bill as containing no equity, and its judgment was affirmed in the District Court.

In a case entirely similar in this court, it was said: "This is not a proper case for equitable relief. If the assessment be void, as alleged, it will not protect the officer, nor will a sale divest the

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 State of Missouri v. Bonnell.
 

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plaintiff of his property. The wrong can be fully compensated for at law. It is not in any sense an irreparable injury, and no reason exists for transferring the jurisdiction over such cases from law to equity. There is as yet no authority of this court, that we are aware of, to warrant this relief, and we are not disposed to make one by sanctioning the present proceeding." (Per Leonard, J., in Sayre v. Tompkins, 23 Mo. 443.)

Let the judgment be affirmed. The other judges concur.

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STATE OF MISSOURI, Appellant, v. MARTIN C. BONNELL,  
Respondent.

1. *Criminal law—False pretenses, obtaining money under—Indictment for, should set out what.*—Where money or other property is obtained by sale or exchange of property effected by means of false pretenses, such sale or exchange ought to be set forth in the indictment; and the false pretenses should be alleged to have been made with a view to effect such sale or exchange; and it should be averred that by reason thereof the party was induced to buy or exchange. For failure to set out these allegations, the indictment should be quashed.

*Appeal from First District Court.*

H. B. Johnson, Attorney-General, for appellant.

I. The indictment distinctly and specifically avers that the defendant obtained the money from Hoover by means of the false pretenses previously recited, which is equivalent to alleging that the false pretenses were believed and acted upon by Hoover. (2 Am. Crim. Law, § 2128; People v. Miller, 2 Pars. Crim. Rep. 197; Commonwealth v. Mason, 9 Gray, 125; State v. Green, 7 Wis. 676; 2 Am. Crim. Law, § 2162.) The case of Commonwealth v. Strain, 10 Mete. 521, was a case of the sale of property and false representations in regard to the character and value of the property, and hence not in point. It was also made under a different statute.

II. The indictment charges the offense in the language of the statute, and this is sufficient.



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State of Missouri v. Bonnell.

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III. Had there been a sale and delivery of the cattle it would have been necessary to set up the contract and sale with more particularity. But this is not the case where the false pretense is in regard to the ownership of property not sold or transferred. (2 Whart. Am. Crim. Law, §§ 2149-50; *Shiff v. The People*, 2 Pars. Crim. Rep. 139; 2 Am. Crim. Law, § 2162; *State v. Vanderbilt*, 4 Dutch, 328.)

*Doniphan, Grubb & Tutt*, for respondent.

The indictment was defective in not charging that Hoover, the prosecuting witness, was induced to part with his property by relying upon the statements of the defendant. (7 Wis. 676; 2 Bish. Crim. Law, 438, 440; 4 Barb. 151; *Commonwealth v. Strain*, 10 Metc. 321; Whart. Am. Crim. Law, § 2128; 13 Wend. 311; see forms and notes in Whart. Pr. & Prec., 1st ed. 262, 2d ed. 557.)

WAGNER, Judge, delivered the opinion of the court.

This was an indictment under the statute for obtaining goods under false pretenses (Wagn. Stat. 461, § 47). The cause was tried at the Buchanan Circuit Court, and the jury found the defendant guilty. A motion was made in arrest of judgment on account of the insufficiency of the indictment, and exceptions were also taken to the admission of evidence and the giving of instructions, all of which being overruled, the case was taken to the District Court, where the judgment of the Circuit Court was reversed. The indictment substantially avers that the "defendant Bonnell, devising and intending to cheat and defraud one Jacob Hoover of his goods, moneys, chattels, and property, feloniously, unlawfully, knowingly, and designedly did falsely pretend to the said Jacob Hoover that he, the said Martin C. Bonnell, was then and there the owner of and had the right to sell and could make a good title to three head of cattle, whereas, in truth and in fact, he, the said Martin C. Bonnell, was not then and there the owner of said cattle, nor had he then and there the right to sell the same, nor could he make a good title to the said cattle, nor any title whatever, as he at the time well knew; by means of which said

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State of Missouri v. Bonnell.

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false pretenses the said Bonnell did feloniously, unlawfully, knowingly, and designedly obtain from the said Hoover the sum of thirty dollars, with intent to cheat and defraud," etc.

Although, under the liberal system of criminal practice now prevailing in this State, the same strictness is not required that was formerly necessary, still the pleader must set out in the indictment a substantive offense, and on the trial the prosecution will be confined in the proof to the allegations set forth in the indictment. It will be observed that the indictment does not allege any bargain, nor any colloquium as to a bargain, for the cattle, nor is there any inducement to show by reason whereof Hoover parted with his money.

In *The State v. Newell*, 1 Mo. 248, it was held that an indictment was well laid which charged that "N." obtained bills by pretending he had slaves, which he sold for said bills, when, in fact, he had no slaves. In *Commonwealth v. Strain*, 10 Metc. 521, it was said that an indictment for obtaining money, goods, or other property, by any false pretense, with intent to defraud, must set forth all the material facts and circumstances which the prosecutor would be bound to prove in order to procure a conviction. It was accordingly decided that an indictment was insufficient if it merely stated that the defendant, intending to cheat and defraud A. of his money and property, designedly and knowingly did falsely pretend to A. that a watch, which the defendant had, was a gold watch, by means whereof the defendant did designedly and knowingly obtain from A. thirty-five dollars, with intent to cheat and defraud him of the same, whereas, in truth, the said watch was not, and the defendant knew that it was not, a gold watch. That case and the case at bar are identical in principle, and the indictments are the same in all material parts.

In Wisconsin the court declares that in order to sustain a conviction for obtaining goods under false pretenses, it must be averred in the indictment and proved on the trial that the party defrauded was induced to part with his property in consequence of the false representations. (*State v. Green*, 7 Wis. 676.) I think that in a case like the present, where the alleged false pre-

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State of Missouri v. Bonnell.

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tenses were injurious only by inducing another person to buy the cattle as to which such false representations were made, such sale, bargain, or agreement, which was the cause of the party advancing or parting with his money, should be set out as a part of the facts relied upon, and as a material allegation in the description of the offense.

I can not better express the idea than by adopting the language of the court in Strain's case: "It seems to us that when money or other property is obtained by a sale or exchange of property effected by means of false pretenses, such sale or exchange ought to be set forth in the indictment, and that the false pretenses should be alleged to have been made with a view to effect such sale or exchange, and that by reason thereof the party was induced to buy or exchange, as the case may be."

The indictment does not aver that Bonnell sold the cattle to Hoover, that he exchanged them, gave him a lien on them, or did anything else which operated as an inducement to the payment or advancement of the money. Yet some of these facts were necessary to be proved in order to sustain a conviction. The State could not make out a case in any other way, and the principal proof submitted at the trial went to show that Bonnell sold and Hoover purchased the cattle. This evidence under the indictment was wholly inadmissible.

Upon the whole case, I am clearly of the opinion that the indictment does not plainly and distinctly set forth the offense intended to be charged; that it does not contain an averment of the material facts which the State would be bound to prove before it could ask a conviction. The judgment should therefore have been arrested.

With the concurrence of the other judges, the judgment of the District Court will be affirmed.

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Garner v. Hudgins et al.

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HENRY C. GARNER, Appellant, v. WILLIAM HUDGINS *et al.*,  
Respondents.

1. *Statute of frauds—Promise to indemnify one not a creditor—Effect of, under the statute, when not in writing.*—A. & B. composed a firm. B. gave his individual note for a certain sum, and C., being induced by the assurances of the firm that the money to be raised on the note was for their benefit, and that they would pay it, signed the same as surety. B. turning out insolvent, C. was compelled to pay the note, and brought suit against A., the remaining partner, for the amount. *Held:*

1. That the engagement of the firm was, in effect, a promise to indemnify C.
2. That being a promise to indemnify, it was not void under the statute of frauds, as made to C., who was not a creditor.
3. That the firm being liable for the note to B., the engagement of the firm was a promise to indemnify C. for an obligation which was their own, and hence was not void under the statute as not being in writing.

*Appeal from Fifth District Court.*

*Hall & Oliver*, for appellant.

*Vories & Vories*, for respondents.

BLISS, Judge, delivered the opinion of the court.

The petition recites that James T. Hudgins was director of the Farmers' Bank of Missouri, and that on the 28th of January, 1858, the firm of Wm. Hudgins & Co., composed of defendants and said James T. Hudgins, desired to procure a loan of \$3,700; and for reasons set forth, the said firm, by the name of and through the position of said James T., procured said loan and used it in the firm business, the said James T. executing his note at six months, with sureties for said sum; and it being understood when said note was executed that its proceeds were for the use of the firm, and that the firm was to be liable for its payment. The note was renewed from time to time until its last renewal, on the 25th of December, 1862, with the same understanding and agreement, the said firm paying the interest at each renewal. The petition charges that at said date, defendant Bayliss, then transacting the business of the firm, acknowledged that said debt was obligatory upon the firm, and promised that the firm should pay



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Garner v. Hudgins et al.

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it, and that the plaintiff became surety, upon said last renewal at the special instance and request of said firm, and specially that said Bayliss, acting for the firm, represented to and promised the plaintiff, at the time of said last renewal, that it was made to give said firm of Wm. Hudgins & Co. longer time to pay the debt; that the note was given for their benefit, and that they would pay it; and that the plaintiff, relying upon and induced by such representations and assurances, signed said note as surety. The petition further shows that the note was protested for non-payment; that the said firm of Wm. Hudgins & Co. failed to pay the same and protect the plaintiff as their surety; that the said James T. Hudgins is dead, and his estate is insolvent and wholly unable to pay the same; and that the plaintiff, on the 20th of November, 1867, as such surety, paid upon the note the sum of \$600, which he seeks to recover back in this action. To this petition a demurrer was filed, which was sustained by the Circuit and District Courts.

This court has already decided, in *Farmers' Bank of Missouri v. Bayliss et al.*, 35 Mo. 428, and 41 Mo. 274, that this firm of Wm. Hudgins & Co. is not liable to the said bank either upon this note or for the money advanced upon it; and defendants now insist that if not so liable to the bank that discounted the note, they can not be held by a surety who has been compelled to pay it.

In the cases referred to, the court decided that there was no privity of contract between the bank and the said firm; that in discounting the note no credit was given to the firm, but only to the parties to the note; and that the fact that the money was borrowed upon the credit of the note, for the use of the firm, only created a creditor and debtor relation between the maker of the note and the firm. Certain remarks of the judge who delivered the opinion in the last case seem to have been relied upon by the courts below in sustaining the demurrer. The judge says, on page 288: "If the indorsers on the note are obliged to pay it, they have their recourse upon the maker, for whom they are sureties, and he may have his account against his firm, to whose use he has applied the money." This is undoubtedly true; but



it is not necessarily true that the indorsers' sureties have no other remedy against the insolvent maker.

In *Higgins v. Dellinger*, 22 Mo. 397, where one borrowed money to remit to his brother, and gave a bond with the plaintiff as surety, who afterward paid the bond, the court, without any direct evidence of the fact, but in furtherance of justice, held the person who borrowed the money to have been the agent of the one to whom it was remitted, and hence that the latter was holden to the surety; but Judge Leonard, in giving the opinion, remarked: "If, however, S. D. borrowed the money for himself, either to pay a debt he owed his brother or to make a loan to him, then F. (the brother) was not liable to the plaintiff, but to his brother's estate." This case, then, to which we are referred by the present plaintiff, is not in point; for, as we have seen, this court has twice decided that the note in question was not the note of Wm. Hudgins & Co., but of James T. Hudgins, which is inconsistent with the idea that he executed it as their agent. Hence, if they are holden at all, it must be upon some other principle.

The engagement of defendants set out in the petition, so far as the plaintiff is concerned, has the effect of and is in the nature of a promise to indemnify; and defendants deny their obligation because it was made without consideration and was not in writing. Its consideration is apparent, when we consider that the plaintiff was induced by it to become a party to the note; but the facts that the note was a debt of James Hudgins, and the promise was not in writing, would seem, at first sight, to bring it within the statute of frauds.

It has been sometimes held that a promise to indemnify did not come within the statute, but it seems to be now settled by the better authorities that where the promise is collateral merely, the promisor having no interest in the liability guaranteed against, and being under no obligations to pay it, it is not obligatory unless in writing. (See *Brown on Frauds*, §§ 168-71, and cases cited.) But the promise to indemnify is only embraced by the statute when it is to pay the debt of another, and hence an indemnity against one's own obligation or liability does not come within it. (See cases cited in note to § 188, *Brown on Frauds*.)

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Garner v. Hudgins et al.

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The remark of this court in *Howard v. Coshov*, 33 Mo. 118, that the statute applies only to promises made to the creditor, is, in general, correct, but can not apply to promises of indemnity.

Unless, then, in the case at bar, the defendants were under some obligation in regard to the subject-matter of this note, the agreement to pay it as an inducement to the action of the plaintiff in signing it, can not be enforced as an indemnity. It is unnecessary to consider what precisely in all cases that obligation should be, but I have no hesitation in holding that in the present case the obligation of the defendants was sufficient to hold them to their undertaking.

This court has not decided, as seems to be assumed, that the defendants are not liable for this debt, but only that they were not parties to the note and are not liable to the bank. Their liability to James T. Hudgins, who obtained the money for them, is expressly recognized in the cases cited. It was his duty to pay the note, and it was the duty of the firm to pay him. The obligation upon the defendants was the same, and it did not matter to them whether they paid it to one or the other. The bank might not be able to compel them to pay it, because there was no contract between them; but James Hudgins could: and being so obligated, and in order to extend their credit, they induced the plaintiff to become surety upon the last renewal, by admitting that the money was obtained for their use, that they were bound to pay the note, and by agreeing to pay it at maturity. They thereby substantially undertook to indemnify for a liability for their own debt as well as that of the maker of the note. Most of the cases reported involving the application of the statute are where the promise is direct to pay the debt of another, and that promise is sought to be enforced by the creditor. In those cases the rule has generally been that if the engagement be only collateral to the original undertaking, the promisor becoming but a surety to the principal debtor, it comes within the statute and must be in writing. But even then, if the promise be to pay a debt which the promisor is already under obligation to discharge, or when the promise is in effect to pay his own debt, although that of a third person be incidentally

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Garner v. Hudgins et al.

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guaranteed, it does not come within the statute (*Johnson v. Gilbert*, 4 Hill, 178; *Brown v. Curtis*, 2 N. Y. 225); and upon this principle the assignor of a promissory note is held by his guaranty, though not complying with the forms of the statute, because, upon assigning the note for value, he becomes a conditional debtor to the assignee, and thus guarantees his own debt. And the principle is carried still further. After commenting upon a number of decisions, the Supreme Court of Massachusetts, in *Nelson v. Boynton*, 3 Metc. 402, states it thus broadly, and says that "cases are not considered as coming within the statute when the party promising has for his object a benefit he did not before enjoy, accruing immediately to himself; but when the object of the promise is to obtain a release of the person or property of the debtor, or other forbearance or benefit to him, it is within the statute."

The principle thus recognized should apply with more force to cases of indemnity, which usually are not, even in form, promises to pay the debt of another, but to save harmless the promisee. Thus, in *Harrison v. Sawtell*, 10 Johns. 242, the defendant being bound to protect a third person, obtained special bail for him, and verbally promised to indemnify the person becoming bail. The court held that the statute of frauds had nothing to do with it, for the reason that the plaintiff had become bail for a third person whom the defendant was bound to protect and save harmless in the suit.

Defendants' counsel seem to assume in argument that the money thus borrowed by James T. Hudgins for the use of the firm was to furnish his share of the capital of the firm, or to pay some debt due them. But this idea is negatived by the averments of the petition. The defendants acknowledged the indebtedness to be theirs, and agreed to pay it; and that agreement being made with the plaintiff, who is not a partner, as an inducement to his action, becomes, so far as he suffers by that action, a debt of the firm.

The judgment of the District and Circuit Courts are reversed and the cause remanded. The other judges concur.

BENJAMIN J. STEVENS, Defendant in Error, v. JOHN A. HAMPTON *et al.*, Plaintiffs in Error.

1. *Conveyances—Improper acknowledgment—Actual and constructive notice.—*

Where a recorded instrument shows upon its face that the acknowledgment was taken by a party in interest, it is improperly recorded, and is no constructive notice; but when it is fair upon its face, it is the duty of the register to receive and record it, and its record operates as notice notwithstanding that there may be some hidden defect. Yet a conveyance, though improperly acknowledged, is good as between the parties or those purchasing with actual notice.

2. *Bills and notes—Misconception, what does not amount to.—* The fact that a deed of trust purported to be given to secure a promissory note due the beneficiary, whereas in truth it was given to indemnify him as surety upon a note to a third person, does not amount to such a misdescription as should affect the validity of the deed.

*Error to Fourth District Court.*

*Carr*, for plaintiffs in error.

I. Plaintiff in error is a *bona fide* purchaser for a reasonable consideration, without notice, and as such he is entitled to be protected. (Sto. Eq., §§ 165, 381, 409-10; *Grisley v. Thayer*, 23 Wend. 388; *James v. Johnson & Morey*, 6 Johns. Ch. 417.)

II. The deed of trust executed by Hobson to John E. Lockwood, to secure Hoffner, having been recorded first, secured the first lien on the property in controversy. (R. C. 1855, §§ 40-43, ch. 72, p. 364; *Waldo v. Russell*, 5 Mo. 387; *Bellas v. McCarty*, 10 Watts, 13; *Vaughan v. Tracy*, 22 Mo. 415; *Beattie v. Butler*, 21 Mo. 322; *Williamson v. Brown*, 15 N. Y. 354.)

III. Plaintiff in error is protected as a purchaser under Hoffner, although she may have purchased with actual notice of the first deed of trust. (*Fort v. Burch*, 5 Denio, 187.)

IV. The mis-recital of the note will not vitiate said deed of trust. (*Scott v. Bailey*, 23 Mo. 150; *Shirras et al. v. Craig et al.*, 7 Cranch, 34; *Jackson v. Bowen*, 7 Dana, 13; 4 Dana, 406; 5 Dana, 530; 8 Johns. 455.)

V. The recording of the first deed of trust after the second, but before the sale under the second, is no notice, actual or constructive, to the *cestui que trust* in the second deed of trust.

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Stevens v. Hampton et al.

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(*Stuyvesant v. Hall*, 2 Barb. 158; *Truscott v. King*, 6 Barb. 346; *Bushell v. Bushell*, 1 Scho. & Lef. 90; *Leibey v. Wolf*, 10 Ohio, 83; *Halstead v. Bank of Kentucky*, Marsh., Ky., 558; *Wiseman v. Westland*, 1 Young & Jervis, 117; *Bedford v. Bachhouse*, W. Kelynge, 5.)

VI. The acknowledgment of the grantor to the first deed of trust was taken by Edward A. Lockwood, the trustee, to himself. It was not proved by any subscribing witnesses. The record of it was not in pursuance of any law, hence it did not impart any notice to any person.

*Redd*, for defendant in error.

I. Plaintiff in error, to entitle her to protection against plaintiff's elder title, must show either that she is a *bona fide* purchaser for a valuable consideration without notice of plaintiff's elder title, or that her grantor is a purchaser *bona fide* for a valuable consideration without notice. She has failed to show either.

II. The filing of the deed of trust from Hobson to Edward A. Lockwood, on the 29th of March, 1861, to secure the payment of the purchase money due to plaintiff, imparted notice to defendant of the existence and contents of the deed and of plaintiff's equity under it. (R. C. 1855, ch. 92, p. 364, § 41; 1 Sto. Eq., § 403; *Johnson v. Stagg*, 2 Johns. 514, 522; *Jackson v. Post*, 15 Wend. 594; *Jackson v. Paige*, 4 Wend. 591; *Tuttle v. Jackson*, 6 Wend. 226; *Frost v. Buckman*, 1 Johns. 298; *Parkhurst v. Alexander*, *id.* 398.)

BLISS, Judge, delivered the opinion of the court.

The plaintiff brings ejectment for certain land near the city of Hannibal, and both parties claim under one Carmi Hobson, and were purchasers at sales under different deeds of trust executed by him. The one under which the plaintiff claims was given in June, 1859, to Edmund A. Lockwood, as trustee, to secure the plaintiff in certain notes for the purchase money, and, some months after, was acknowledged before the said trustee. It



was not, however, filed for record until March, 1861, and in the meantime—to-wit: on the 28th day of July, 1860—said Hobson executed another deed of trust to John A. Lockwood, trustee, purporting to secure a note given to one Hoffner for \$1,050, but in fact given to secure said Hoffner as security upon such note to a third person, which last deed was immediately recorded. In August, 1861, which was after the first deed was recorded, the defendant, Mrs. Hampton, purchased at a trustee's sale under the deed last executed but first recorded, and the purchase money was applied to extinguish the note for which the beneficiary, Hobson, had become liable; and in 1864 the plaintiff purchased under a sale made by his trustee.

We must treat the deed to Edmund A. Lockwood, trustee, and acknowledged before him, as though never acknowledged, unless we assume that a party to a deed may take its acknowledgment, which will not be seriously claimed. There are several cases where an acknowledgment was attacked upon the ground of interest in the party taking it, and in every case the incompetency of a grantee is assumed. In *Groesbeck v. Seeley*, 13 Mich. 329, the court says: "We should have no hesitation in holding that a person could not take the acknowledgment of a deed made to himself. Such a point is too plain for doubt." *Dussaume v. Burnett*, 5 Iowa, 95, seems to recognize, on page 103, the doctrine that the party to the instrument can not take its acknowledgment; and in *Wilson v. Traer & Co.*, 20 Iowa, 231, an acknowledgment before one of the grantees is expressly held to be void. The court, in *Beaman v. Whitney*, 20 Me. 413, speaks of an acknowledgment before a grantee "as at most a void acknowledgment, leaving the deed operative between the parties," etc. *Withers v. Baird*, 7 Watts, 227, was an action of covenant to recover the price of a tract of land, and the defense was that no sufficient deed had been tendered. It appeared that the plaintiff, who had agreed to make the deed, obtained one from one Baxter and wife, who held the title, which was made directly to the defendant and acknowledged before the plaintiff. The court, per Gibson, J., held the acknowledgment to be insufficient to bar the dower of Baxter's wife, as the duties of a magis-

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Stevens v. Hampton et al.

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trate in regard to her separate examination are judicial, and can not be performed by a party interested.

On the other hand, *Lynch v. Livingston*, 6 N. Y. 422, and *Kimball v. Johnson*, 14 Wis. 674, seem to recognize a contrary doctrine, although I think there is no real conflict. In the former case an ordinary acknowledgment was held to be a ministerial act, and hence did not come under the prohibition against the action of judges or jurors who were relatives of the parties. In the latter case a mortgage was given to a married woman to secure her for money loaned which belonged to her separate estate, and was acknowledged before her husband. In regard to his action the court simply says: "We do not think on that account he was disqualified from taking it." In this case the husband was not a party to the instrument, and could have no interest in the separate estate of the wife; and the court doubtless treated his action as ministerial, and not affected by his relationship to the grantee.

In the cases referred to, where the acknowledgment was held invalid, the party taking it was, or was supposed to be, a party in interest. I have found no case where it was taken by a trustee; and perhaps there might be ground for holding that where the grantee was a mere naked trustee, the title, by the statute of uses, vesting at once in the beneficiary, the acknowledgment should be held to be valid. But trustees to hold in pledge, with power of sale, stand in a very different relation. The objection to the party in interest is analogous to the one forbidding a judge to pass upon his own case. Though the act may not be strictly judicial, it is of a judicial nature and requires disinterested fidelity. We know that in practice this kind of trustee is always selected by the beneficiary; he is controlled by the beneficiary in fixing the time of the sale, and its proceeds come into his hands. There is such an interest that, as to the requisites of the deed itself, he should be placed upon a level with the other parties, and be incapacitated from holding any official relation to its execution.

The want of a proper acknowledgment does not, however, invalidate the deed, but only goes to the effect of the record. If not acknowledged or proved, its record is not provided for by law, and the fact that it may be copied upon the book of records will

not operate as constructive notice to subsequent purchasers. (Dussaume v. Burnett, 5 Iowa, 95; Lessee of Schultz v. Moore, 1 McLean, 520; Barney v. Sutton, 2 Watts, 31; Hastings v. Vaughan, 5 Cal. 315; Price v. McDonald, 2 Md. 403; Johns v. Scott, 5 Md. 81.) The deed, however, is good as between the parties, and should prevail against subsequent deeds to those who had actual notice of its existence. (Dussaume v. Burnett, *supra*; Caldwell v. Head, 17 Mo. 561; Corby v. Rankin, 11 Mo. 647.)

In view, then, of the acknowledgment as affecting the right of record and the question of constructive notice, the following would seem to be a reasonable rule: that when the recorded instrument shows upon its face that the acknowledgment was taken by a party, or party in interest, it is improperly recorded, and is no constructive notice; but when it is fair upon its face it is the duty of the register to receive and record it, and its record operates as notice notwithstanding there may be some hidden defect.

In the case at bar, the second trust deed—that is, the one under which defendant purchased—is the only one entitled to record; and the question of priority, so far as it depends upon constructive notice, need not be considered. Still, if the beneficiary in that deed was actually advised in regard to the former before he assumed the obligation upon the strength of the security, his lien, so far as he is concerned, must be subject to that created by such former deed, though otherwise as to an innocent purchaser from him.

I have not noticed the provision of our statute (Wagn. Stat. 595) that makes the record of a deed, defectively acknowledged, operate as constructive notice, because, by its terms, it could only refer to records made before its enactment.

Upon the subject of notice the plaintiff asked for instructions to the jury, which the court refused to give, embracing the following points:

1. That if Hoffner, the beneficiary in the second deed of trust, had notice, at the time of its execution and delivery, of the former deed, the plaintiff should recover, notwithstanding such former

deed, provided the former deed was recorded before the sale to defendant.

2. That if John A. Lockwood, the trustee in the second deed of trust, had notice, at the time of its execution and delivery, of the former deed, the plaintiff should recover, notwithstanding, etc.

But the court, at defendant's instance, gave the following:

1. "If the deed of trust to secure Hoffner was recorded before he had notice of the deed in favor of Stevens, the jury will find for the defendant."

2. "If the deed to Mrs. Hampton was made, and the money paid before she had notice of a prior deed, other than by the records, they will find for defendant, even though Hoffner had notice."

By comparing the instructions refused with the second one given, it will be seen that the Circuit Court held Mrs. Hampton, the defendant, who bid in and claims title to the property, to be protected by her ignorance of the former deed, notwithstanding Hoffner, the beneficiary, and his trustee may have been advised of such deed. It seems to have been for this supposed error that the District Court reversed the judgment of the Circuit Court, though it appears also to have treated the record of the first deed, with its defective acknowledgment, before the sale under the second deed, as constructive notice.

The Circuit Court committed no error, and the law upon the subject can not be better stated than in the language of Judge Story: "If a person who has notice sells to another who has no notice, and is a *bona fide* purchaser for a valuable consideration, the latter may protect his title, although it was affected with the equity arising from notice in the hands of the person from whom he derived it; for, otherwise, no man would be safe in any purchase, but would be liable to have his own title defeated by secret equities, of which he could have no possible means of making a discovery." And, after quoting an old English authority, he further says: "This doctrine has ever since been adhered to as an indispensable muniment of title. And it is wholly immaterial of what nature the equity is, whether it is a lien or an encumbrance, or a trust, or any other claim; for a *bona fide* purchase

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Russell v. Grimes.

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of an estate, for a valuable consideration, purges away the equity from the estate in the hands of all persons who may derive title under it, with the exception of the original party, whose conscience stands bound by the violation of his trust and meditated fraud." (Sto. Eq., §§ 409-10; see also *Fort v. Burch*, 5 Denio, 187.)

Another question is raised by the record. The second trust deed, being the one under which Mrs. Hampton purchased, purports to be given to secure a promissory note due the beneficiary, whereas the evidence shows that it was given to indemnify him as security upon a note to a third person, and the proceeds of the sale were applied in the payment of such note. It does not appear that the purchaser knew of this misdescription of the debt; but whether she knew it or not, there is no such variance as should affect the validity of the second deed. The legal title was in the trustee; the amount of the debt was correctly described; the default was made, and the proceeds of the sale were applied to extinguish the contingent liability to the beneficiary as well as the actual liability to the payee of the note. No fraud is pretended, and there was no such misdescription as could injure any one. The courts have uniformly sustained *bona fide* mortgages, notwithstanding the debt may have been incorrectly set out in the condition; and parol evidence is admissible to explain the consideration. (*Scott v. Bailey*, 23 Mo. 140; *Shirras v. Craig*, 7 Cranch, 34.)

The other judges concurring, the judgment of the District Court is reversed, and that of the Circuit Court affirmed.

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WM. RUSSELL, Respondent, v. JOHN GRIMES, Appellant.

1. *Partnership—Settlement—Action between partners—Bill in equity, when unnecessary.*—If one partner collect a portion of the claims due the firm, and fail to account for the amount so collected in the partnership settlement, he may be sued by the other partner without any impeachment of the settlement or readjustment of the partnership accounts. Partners are not forbidden to sue each other at law, merely because they are or have been partners, but only when the adjustment of the matter in controversy involves the investigation and settlement of partnership accounts.



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Russell v. Grimes.

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2. *Partnership—Suit by partner for balance due, can not be brought without settlement and balance struck.*—A partner can not sue his copartner at law for any balance claimed to be due him, unless there has been a settlement and balance struck, and even then it has been generally held that there must have been an express promise to pay such balance. But when, after a settlement, it was discovered that a single item or number of items of cash, and nothing more, had been received by one partner and fraudulently withheld from the account—that the debts were all paid, and that payment of half the amount to his copartner would settle everything—*semble*, that, under the code, a claim for the one-half might be sustained without an express promise and without formally opening the settlement.

*Appeal from Fifth District Court.*

*Dunn & Garner, and Vories & Vories, for appellant.*

*Donaldson, for respondent.*

BLISS, Judge, delivered the opinion of the court.

Plaintiff and defendant were partners, and upon suit for a settlement of their partnership accounts the matter was referred to referees, who reported that there were debts due the firm amounting to \$2,255.68, and recommended that they be divided between the partners by an impartial committee, which was done. After the division and close of the suit the plaintiff sues defendant, charging in the first count of his petition that certain notes, specifying them, were turned out to him at their face, and that he received them at said settlement for, and was charged with, the amount appearing due upon them, but that a portion of the amount so due and charged, specifying the amount upon each note, had been, without the plaintiff's knowledge, paid over to the defendant and appropriated to his own use. As the defendant demurred to the whole petition because it did not state facts sufficient to constitute a cause of action, we will first consider whether this count is sufficient to charge the defendant.

The petition, so far, does not seek to settle the partnership accounts, nor does it attack the settlement already made. It simply charges the defendant with having received money upon claims which, by the settlement, became the individual property of the plaintiff; and the plaintiff then acquired a separate property

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Russell v. Grimes.

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not only in the balance due upon those claims, but, as against his partner, to their full amount. It seems clear to me, then, that if the defendant had collected any portion of those claims, and had not accounted for the amount so collected in the partnership settlement, the plaintiff was entitled to it; and the prosecution of the claim does not involve any impeachment of the former legal proceedings, or any readjustment of the partnership accounts. Partners are not forbidden to sue each other at law merely because they are or have been partners, but only when the adjustment of the matter in controversy involves the investigation and settlement of the partnership accounts. (*Whitehill v. Shickle et al.*, 43 Mo. 543.) Nor is it any reason why a recovery should not be had, that the partnership accounts have been adjusted by action; but, on the other hand, the sole right of the present plaintiff to the money so collected by defendant arises out of the judgment in that action.

Suppose, upon the settlement, there had been a division of property in specie, and a specific horse or box of goods had been turned over to the plaintiff, and he was charged with its full value, and it should turn out, when he went to take possession of the property, that it had been secretly sold and the money appropriated by the defendant. In an action to recover its value, could the defendant plead no liability because they had been partners, and because plaintiff's exclusive title to the property arose from a judgment? The District Court was right in holding that this count set forth a valid claim. (*Crosby v. Nichol*, 3 Bosw. 450.)

The petition contains three other counts, and the second count charges that the committee intended and supposed they had divided between the partners all the claims due the partnership, and trusted to the defendant, who was the book-keeper of the firm, to make a correct exhibit of them, but that he fraudulently concealed and failed to report a large number of accounts, a schedule of which is filed, amounting to \$2,047.43, for half of which he asks judgment.

The third count charges that he had collected the aggregate sum of \$1,495, not entered upon the books, giving a schedule of the items, which he fraudulently concealed and failed to account

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Russell v. Grimes.

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for on the settlement, and asks judgment for half; and the fourth count charges a like collection of \$255 upon accounts which were upon the books.

It will readily be seen that the adjustment of the claims described in those counts, taken together, would involve a settlement of so much of the books and accounts of the firm as were not before settled. They each describe by schedule a long list of claims, receipts, etc., which should have been, but were not, included in the former settlements, and in which the plaintiff has as yet acquired no separate interest.

A partner, in general, is not entitled to any specific claim collected, or to any proportion of it, but only to his proportion of the balance belonging to the firm after full settlement. He can not sue his partner at law for any balance claimed to be due him unless there has been such settlement and balance struck, and even then it has been generally held that there must have been an express promise to pay such balance. (Casey v. Brush, 2 Caines, 293; Murray v. Bogart, 14 Johns. 318; Pattison v. Blanchard, 6 Barb. 537.) Where the old distinctions between law and chancery proceedings are merely formal, no attention, perhaps, under the code, should be paid to them. But where causes involve substantially different proceedings and different relief, the distinction exists in the nature of things, and can not be disregarded. Thus, after the account and judgment, as set forth in the petition, if it should be discovered that a single item or a number of items of cash had been received by the defendant and fraudulently withheld from the account; and if it should further appear that these items were all that was not included, that the debts were all paid, and that the payment to the plaintiff of half their amount would settle everything, we might perhaps be justified under the code in sustaining a claim for the half without an express promise, and without formally opening the settlement for an account of the new matters, because thus complete relief could be given. But the case before us is not one of this kind. The second, third and fourth counts, as we have seen, show that there were many things left out of the former settlement. The law of partnership, and not the code of procedure, requires an account

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State of Missouri v. Hundley.

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and adjustment of the whole partnership business before the interest of any one partner can be ascertained, and before he is entitled to anything specifically. Upon the second count there could not, by possibility, be a judgment in this action; and a judgment upon the third and fourth, if they contained sufficient allegations to warrant one, would leave many matters open, and render a new trial necessary. It is perfectly clear that there must be a new accounting, and as to all the charges not embraced in the first count of this petition, the plaintiff, by a new proceeding, should obtain an order for opening the former judgment and letting in for settlement all the partnership transactions not already adjusted.

So far as the second, third and fourth counts are concerned, a demurrer as to them would have been well taken; but the first count being a good one, the action of the Circuit Court in sustaining the demurrer was erroneous, and the judgment of the District Court reversing it is sustained and the cause remanded. The other judges concur.

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STATE OF MISSOURI, Respondent, *v.* WILLIAM HUNDLEY,  
Appellant.

1. *Criminal law—Insanity to be determined like any other fact.*—In the trial of a criminal case the burden of establishing the insanity of the accused to the satisfaction of the jury rests upon the defense; but it is unnecessary that his insanity should be established beyond a reasonable doubt. All symptoms and tests of mental disease are purely matters of fact for the jury, and to be determined like other facts; and it is sufficient if the jury are reasonably satisfied from the weight or preponderance of evidence that the accused was insane at the time of the commission of the act. (*State v. Klinger, ante*, p. 224.) And an instruction which requires a *clear* preponderance of evidence to establish sanity introduces a qualification not warranted by law, and calculated to mislead.
2. *Criminal law—Temporary insanity caused by intoxication, responsibility for.*—Temporary insanity, produced immediately by intoxication, does not destroy responsibility for crime, where the patient, when sane and responsible, made himself voluntarily drunk; but, to be punishable, the crime must be the immediate result of the fit of intoxication, and while it lasts, and not the

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State of Missouri v. Hundley.

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result of insanity remotely occasioned by previous bad habits. In the latter case insanity is entitled to the same consideration as when arising from any other cause.

3. *Practice, criminal*—*Court can not instruct on weight and sufficiency of evidence.*—Under the present statute relating to practice in criminal cases (Wagn. Stat. 1106, § 30), it is error for a court to single out certain testimony in a cause and tell the jury that it is entitled to great or little weight. It is for the court to determine upon the legitimacy and appropriateness of the evidence, but the jury are the sole and exclusive judges of the credit and weight that is to be attached to it.

*Appeal from Fifth District Court.*

*H. M. Vories*, with whom were *B. F. Loan & S. Woodson*,  
for appellant.

The seventh instruction given for the State was calculated to mislead the jury to the prejudice of the defendant, and was a comment or argument upon the evidence by the court, which is forbidden by the law, and trenches upon the province of the jury. (*Schneer v. Lemp*, 17 Mo. 142; 8 Mo. 268; *Whitney v. The State*, *id.* 165; *Garesche v. Boyce*, *id.* 228, 232; *Emerson et al. v. Sturgeon*, 18 Mo. 170; *Rippy v. Friede*, 26 Mo. 523; *Scoggins v. Wilson et al.*, 13 Mo. 80; *The State v. Cushing*, 29 Mo. 215; *Chouquette v. Barada*, 28 Mo. 491-8; *Hine v. St. Louis Public Schools*, 30 Mo. 166; *id.* 201; *Speed v. Herrin*, 4 Mo. 356, 361; *Labeaume v. Dodier*, 1 Mo. 441; *Loehner et al. v. Home Mut. Ins. Co.*, 19 Mo. 628; *McDermott v. Barnum*, 19 Mo. 204; *Baldwin v. The State*, 12 Mo. 223; *Commonwealth v. Rogers*, 1 Lead. Crim. Cas. 87, and note following.) It is for the jury to say what weight they will give the evidence.

*H. B. Johnson*, Attorney-General, with *Chandler & Davis*,  
for respondent.

I. Every man is presumed to be sane. The *onus probandi* is on the defendant to show insanity by a preponderance of evidence (*Baldwin v. State*, 12 Mo. 223; *State v. Huting*, 21 Mo. 464; *State v. Worrell*, 25 Mo. 205; *State v. Klinger*, 43 Mo. 131), and no presumption of continued or permanent insanity



arises from proof of temporary insanity or *delirium tremens*. (Baldwin v. State, 12 Mo. 223; 1 Whart. Crim. Law, § 56; 1 Bish. Crim. Law, § 535; 4 Metc. 546.) Drunkenness is no excuse for crime. Neither can it be taken into consideration in determining the question of intent or malice. (State v. Cross, 27 Mo. 531; 1 Arch. Crim. Pr. & Pl. 31; 4 Blackst. Com., § 6; 1 Bish. Crim. Law, 490, 496, 498; People v. Robinson, 2 Pars. Crim. 235; People v. Hammill, *id.* 223; State v. Harlow, 21 Mo. 446; Shelton v. State, 14 Mo. 502; Hester v. State, 17 Ga. 146; Swan v. State, 4 Humph. 136.) And insanity, to excuse crime, must be of such a character and degree as to render the criminal incapable of distinguishing between right and wrong, in regard to the act charged to be criminal. (Baldwin v. State, 12 Mo. 231; Commonwealth v. Rogers, 7 Metc. 500; State v. Freeman, 4 Dew. 9; 1 Whart. Crim. Law, § 16.)

II. Where the law gives to certain evidence a peculiar legal significance, it is not a commentary on the evidence to declare such rule of law in relation thereto. (Baldwin v. State, 12 Mo. 232; State v. Schoenwald, 31 Mo. 149; State v. Watson, *id.* 361; State v. Martin, 28 Mo. 530; State v. Bryan, 34 Mo. 507; State v. Floyd, 15 Mo. 349; State v. Dunn, 18 Mo. 419; State v. Jennings, *id.*)

WAGNER, Judge, delivered the opinion of the court.

The defendant was indicted in the Circuit Court of Gentry county for murder in the first degree, in the killing of Wm. A. Boyer, and, on a change of venue to DeKalb county, he was convicted and sentenced to be executed. The killing was most clearly proved, and the defense was rested solely upon the ground of insanity. The only question presented for consideration is the propriety of certain instructions given by the court, of its own motion and at the request of the prosecution, and also certain instructions which were asked by the defendant and refused.

An objection is raised against the third instruction given at the instance of the State, because it told the jury that it devolved upon the defendant to show to their satisfaction, by a clear

preponderance of the testimony, that he was insane. The earlier decisions in this court announced the doctrine that a party relying on insanity as a defense should make it out to the satisfaction of the jury, and that he was not entitled to the benefit of a reasonable doubt as to his sanity. (State v. Huting, 21 Mo. 464; State v. McCoy, 34 Mo. 531.) But in the more recent case of The State v. Klinger, 43 Mo. 127, the question was again considered, and we held that the most reasonable rule was, that as the law presumed every person who had reached the age of discretion to be of sufficient capacity to be responsible for his crimes, the burden of establishing the insanity of the accused affirmatively to the satisfaction of the jury, on the trial of a criminal case, rested upon the defense; but that it was not necessary that the defense should be established beyond a reasonable doubt; it was sufficient if the jury were reasonably satisfied by the weight or preponderance of the evidence that the accused was insane at the time of the commission of the act. It seems to me that the court, in the present case, by requiring a clear preponderance of evidence, introduced a qualification that was not enunciated in the Klinger case, and which had an evident tendency, and was calculated, to mislead. Insanity is a simple question of fact, to be proved like any other fact, and any evidence which reasonably satisfies the jury that the accused was insane at the time the act was committed, should be deemed sufficient.

After taking into consideration and overcoming the presumption of sanity, it is not perceived why any higher degree of evidence or any greater amount of proof should be required to prove the fact of insanity than any other question which may be raised and submitted upon the trial of a cause. The correct doctrine is that all symptoms and all tests of mental disease are purely matters of fact, to be determined by the jury; and that evidence which reasonably satisfies a jury that the disease exists, and which would warrant and induce a verdict upon any other issue, ought to be considered sufficient. From the instruction, the jury might have well inferred that a preponderance, or what would reasonably have satisfied them, was not enough, but that something more was necessary.

The fourth instruction, given at the request of the State, and the third instruction, given by the court of its own motion, may be considered together. The first of the two, in substance, declared that the voluntary drunkenness of the defendant, so far as the same was shown by the evidence to have existed at the time of the homicide, was no mitigation of the crime charged; and if the jury believed from the evidence that the defendant was laboring under a temporary frenzy or insanity at the time of the killing of Boyer, which was then and there the immediate result of intoxicating liquors or narcotics, he was equally guilty under the law as if he had been sober or sane at the time of the killing. The latter instruction, which was given directly by the court, told the jury that if they were satisfied, from the weight or preponderance of the whole evidence, that at the time the defendant killed Boyer he was so insane as not to know right from wrong, and as not to know that the act he was committing was wrong at the time of its commission, and that he was so far deprived of will at the time of the commission of the act as not to possess the power of choosing between right and wrong in regard to the act, and that his insanity was not the result of fits of intoxication, but was occasioned by previous habits of intoxication and the long use of narcotics, then they should find the defendant not guilty.

It is well settled that drunkenness does not mitigate a crime. Any other principle would be destruction to the peace and safety of society. Every murderer would drink to shelter his intended guilt. There would be an end of convictions for homicide if drunkenness avoided responsibility. As it is, most of the premeditated murders are committed under the stimulus of liquor. When the guilty purpose is first sedately conceived, most men fortify themselves for the scene of blood by the use of intoxicating drinks. If, therefore, drunkenness imparted irresponsibility, there would be no convictions. If the assassin would not take liquor to strengthen his nerves, he would to evade the penalty of his crime. (Wh. & St. Med. Jur., § 67; 1 Wh. Cr. Law, § 38; State v. Cross, 27 Mo. 332.)

Temporary insanity, produced immediately by intoxication,

does not destroy responsibility where the patient, when sane and responsible, made himself voluntarily drunk. Sir Edward Coke lays down the common-law rule to be, that, "as for a drunkard who is *voluntarius dæmon*, he hath, as has been said, no privilege thereby; but what hurt or ill soever he doeth, his drunkenness doth aggravate it, *omne crimen ebrietas et incendit et detegit*." (Co. Litt. 247, a.) And although it is doubtful whether it can be said that drunkenness aggravates a crime in a judicial sense, yet it is unquestioned that it forms no defense to the fact of guilt.

Thus Judge Story, after noticing that insanity, as a general rule, produces irresponsibility, went on to say: "An exception is where the crime is committed by a party while in a fit of intoxication, the law not permitting a man to avail himself of the excuse of his own gross vice and misconduct to shelter himself from the legal consequences of such crime." (United States v. Drew, 5 Mason, 28.) Sir Matthew Hale, in his "History of the Pleas of the Crown," written nearly two hundred years ago, says: "The third kind of *dementia* is that which is *dementia affectata*, namely, drunkenness. This vice doth deprive men of the use of reason, and puts many men into a perfect but temporary phrenzy; and therefore, according to some civilians, such a person committing homicide shall not be punished simply for the crime of homicide, but shall suffer for his drunkenness, answerable to the nature of the crime occasioned thereby; so that yet the primal cause of the punishment is rather the drunkenness than the crime committed in it. But by the laws of England such a person shall have no privilege by his voluntarily contracted madness, but shall have the same judgment as if he were in his right senses." He then states two exceptions to the rule: one where intoxication is without fault on his part, as where it is caused by drugs administered by an unskillful physician; and the other where indulgence in habits of intemperance has produced permanent mental disease, which he calls "*fixed phrenzy*." (1 Hale, P. C., 32.)

The doctrine and the distinction laid down by Hale have been generally followed by the English courts and in this country.

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State of Missouri v. Hundley.

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The United States v. Drew, *supra*, and The United States v. McGlue, 1 Curtis' C. C. 1, will be found to maintain the principle, upon the authority of Judge Story and Judge Curtis, of the Supreme Court of the United States. These last two cases not only state the general principle, but confirm the distinction announced by Hale, that where mental disease, or, as he terms it, a "*fixed phrenzy*," is shown to be the result of drunkenness, it is entitled to the same consideration as insanity arising from any other cause. The first of them was a case of *delirium tremens*, and Judge Story directed an acquittal on that account.

In the other the evidence left it doubtful whether the furious madness exhibited by the prisoner was the result of present intoxication or of delirium supervening upon long habits of indulgence. Upon this state of the evidence Judge Curtis stated the rule and the exceptions with remarkable clearness and force.

Prof. Greenleaf, whose general accuracy in the statement of legal principles is unquestioned, says that "in criminal cases, though insanity, as we have just seen, is ordinarily an excuse, yet an exception to this rule is where the crime is committed by a party while in a fit of intoxication; the law not permitting a man to avail himself of the excuse of his own gross vice and misconduct to shelter himself from the legal consequences of such crime. But the crime, to be within the exception, and therefore punishable, must take place and be the immediate result of the fit of intoxication, and while it lasts, and not the result of insanity remotely occasioned by previous habits of gross indulgence in spirituous liquors. The law looks to the immediate and not the remote cause—to the actual state of the party, and not to the causes which remotely produced it." (2 Greenl. Ev., § 374.)

The instruction given at the instance of the prosecution told the jury that if they believed from the evidence that the defendant was laboring under a temporary frenzy or insanity at the time of the killing of Boyer, which was then and there the immediate result of intoxicating liquors or narcotics, he was guilty. This instruction was unobjectionable, for, as we have already seen, temporary insanity produced immediately by



intoxication does not destroy responsibility where the accused, when sane and responsible, made himself voluntarily drunk. But the crime, to be punishable under such circumstances, must take place and be the immediate result of a fit of intoxication, and while it lasts, and not the result of insanity remotely occasioned by previous bad habits.

The subsequent instruction, given by the court of its own motion, was unguarded, open to misconstruction, and liable to mislead. It declared that if the defendant was so far deprived of will at the time of the commission of the act as not to possess the power of choosing between right and wrong, and if his insanity was not the result of fits of intoxication, but was occasioned by previous habits of intoxication and the long use of narcotics, then they should find him not guilty.

The distinction that the act must take place and be the immediate result of the fit of intoxication, and while it lasts, in order to render the accused responsible, is here utterly ignored. The insanity might have been found to be permanent, and still the result of fits of intoxication; so that it actually existed, and did not come within the exception to the rule rendering the crime punishable, it could make no difference what it resulted from. The two instructions are inconsistent and contradictory. The one laid down the law correctly, the other impaired its force, and, coming as it did directly from the court, was calculated to operate injuriously against the defendant.

The seventh instruction, upon which error is predicated, is as follows: "The testimony and opinions of the medical witnesses given in this case should be received by the jury with caution, and are entitled to but little weight, unless sustained by reasons and facts that admit of no misconstruction; and said opinions and testimony are not binding on you against your own judgment, for on you alone rests the responsibility of a correct verdict." It is objected that this instruction is a comment on the evidence, and in direct conflict with the provisions of the statute. The instruction might find countenance and support where the old system of practice prevails, and where it is permissible for the court to make comments on the evidence, and instruct the

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State of Missouri v. Hundley.

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jury as to its sufficiency and weight. But under our statute the whole rule is changed, and comments by the court are entirely forbidden. (2 Wagn. Stat. 1106, § 30.) Since the adoption of this clause in the statute the ruling has been uniform, and there is hardly a volume of the reports in which it is not laid down that it is error for a court to instruct a jury upon the weight and sufficiency of the evidence. It is for the court to determine upon the legitimacy and appropriateness of the evidence, but the jury are the sole and exclusive judges of the credit and weight that is to be attached to it. For a court to single out certain testimony in a cause, and tell the jury that it is entitled to either great or little weight, is contrary to the statutory provision on the subject.

The testimony of medical witnesses, like any other testimony, should be taken into the account by the jury, and they should give it just such weight as they may think it deserves. Whilst the opinions of quacks, mountebanks, and pretenders are entitled to little or no consideration, the opinions of persons of great experience, skill, fidelity, and correctness of judgment, deserve and should receive attention and respect. In speaking on this subject, the late Chief Justice Shaw said: "The opinion of a medical man of small experience, or of one who has crude and visionary notions, or who has some favorite theory to support, is entitled to very little consideration. The value of such testimony will depend mainly upon the experience, fidelity, and impartiality of the witness who gives it." (*Commonwealth v. Rogers*, 7 Metc. 500.)

In the examination of the witnesses it is the privilege and duty of the counsel, for the enlightenment of the jury, to draw forth the capabilities, fitness, and experience of those who undertake to give medical testimony. But where these tests are applied, and the court decides that the evidence is competent, the jury then are the exclusive judges, and are not to be controlled in their determination by the advice and instructions of anybody. An intelligent jury, after hearing the witnesses and observing their respective capacities, will not be slow in coming to a correct conclusion and awarding such consideration as the merits or

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Johnson et al. v. Quarles et al.

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demerits of the evidence may deserve. The instruction was an invasion of the province of the jury, and, I think, clearly wrong.

There is no attempt to deny the killing in this case. The only defense set up to excuse or palliate the deed of violence and wrong, is insanity. This question is at all times difficult to deal with, and it would be wrong to punish a person who was so unfortunate as to be unaccountable by reason of a diseased and disordered mind. On the other hand, there is too much foundation for the remark of Mr. Baron Gurney, on the trial of the case of *Rex v. Reynolds*, that "the defense of insanity has lately grown to a fearful height, and the security of the public requires that it should be closely watched." Recent examples have shown that guilty criminals have escaped merited punishment on this assumed plea, and have been turned loose, to the great detriment and outrage of justice.

The interests of society and the welfare of the community require that justice should be faithfully and rigorously administered. On the one hand, care should be taken that no one be punished whose afflictions render him irresponsible; on the other, the defense of insanity, which is easily simulated, about which there are many crude and perverted notions, and which is usually resorted to when all other defenses fail, should be scanned with the severest scrutiny. The court, we think, committed error in regard to the instructions above noticed in this opinion; otherwise we have found nothing calling for special comment or revision.

With the concurrence of the other judges, the judgment will be reversed and the cause remanded for a new trial.

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SARAH Q. JOHNSON *et al.*, Defendants in Error, v. PATSEY  
QUARLES *et al.*, Plaintiffs in Error.

1. *Equity — Purchase by trustee with money of cestui que trust — Action to divest title — Parol proof.* — A trust will ordinarily result in favor of one whose money is used by another in the purchase of land, where the conveyance is taken to himself instead of the person who furnished the money, and the facts which create the trust may be proved by parol; but such evidence must be clear and unequivocal, and not merely preponderating. There should be no room for reasonable doubt as to the facts relied upon.

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Johnson et al. v. Quarles et al.

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2. *Evidence—Admissions of deceased persons, competency and effect of.*—Evidence of declarations in the nature of admissions by a deceased person, although competent, never amounts to direct proof of the facts claimed to have been admitted by those declarations; and it has sometimes been doubted whether they ought to be received at all when introduced for the purpose of divesting a title created by a deed. However, if properly sustained by other circumstances—as by evidence that the claimant's money was placed in the hands of the deceased for investment; that the property acquired was treated by the parties interested as their property, or by any other facts pointing to them as the equitable owners—such declarations would warrant courts in sustaining the claim.

3. *Evidence—Witnesses, where party is dead—Competency under the statute.*—In suit against the heirs of a deceased person for certain land, on the claim that said estate had been purchased by deceased with the money of plaintiff, and without his consent; the testimony of claimant as to money advanced deceased, and other facts touching the purchase, would be incompetent under the statute pertaining to witnesses. (Wagn. Stat. 1372, § 1.)

*Error to Fifth District Court.*

*T. A. Green*, for plaintiffs in error.

I. A resulting trust is created by operation of law where the purchase money is paid by one party and the conveyance taken in the name of another. (Payne v. Chouteau, 14 Mo. 580; Valle v. Bryan, 19 Mo. 423; Rankin v. Harper, 23 Mo. 579; Kelly v. Johnson, 28 Mo. 249; Cloud v. Ivie, *id.* 578; Baumgartner v. Guessfeld, 38 Mo. 36; Hill. Trust. 92, and notes; Thompson v. Renoe, 12 Mo. 157; Dyer v. Dyer, 1 Lead. Cas. in Eq. 200-1; 5 Abb. N. Y. Dig. 248-9, 268.)

II. A resulting trust can be proved by parol evidence, and the admissions of the party holding the legal title are proper evidence as to who paid the purchase money. (Baumgartner v. Guessfeld, 38 Mo. 38; Hill. Trust. 94-6; Leach v. Leach, 10 Ves. 517; Madison v. Andrews, 1 Ves. 58; Baker v. Vining, 30 Me. 121; Page v. Paga, 8 N. H. 187; 2 Blackf. 441; 4 Blackf. 590; Rider v. Kidder, 10 Ves. 364; Peebles v. Reading, 17 Penn. 216; 8 Serg. & R. 492; Irving v. Ives, 7 Ind. 308; 30 Mo. 121; Am. Law Reg., Sept. '66, p. 675.)

III. The statute (Wagn. Stat. 1372, § 1) does not apply to this case. It only refers to cases where there has been a contract, either express or implied, entered into, and one of the original

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Johnson et al. v. Quarles et al.

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parties thereto is dead. This is a case in which Henry P. Poindexter was guilty of a fraud—a wrong, or a violation of confidence and trust—and his heirs are attempting to reap the benefits of his fraud.

*W. Judson*, for defendants in error.

I. Where it is sought, in the face of an absolute deed, to establish an implied trust by parol evidence alone, the beneficiary's ownership of the purchase money must be clearly proved by undoubted evidence. (*Farrington v. Barr*, 36 N. H. 86; *Brown's Stat. Frauds*, § 91; 1 *Lomax's Dig.* 204; *Baker v. Vining*, 30 Me. 126.)

II. After the death of the nominal purchaser of real property, proof of his declarations while living, that he purchased the property with money belonging to the alleged *cestui que trust*, is not alone sufficient to create a resulting trust. (*Snelling v. Utterback*, 1 Bibb, 609.)

III. Neither Alexander B. Halladay nor his wife, Patsey Q. Halladay, are competent witnesses in this case—Poindexter, one of the parties to the original cause of action, being dead. (*Wagn. Stat.* 1372, § 1; *Stanton v. Ryan*, 41 Mo. 510.) Mrs. Patsey Q. Halladay testifying in behalf of her husband without bringing herself within the qualifying provisions of the statute, is an incompetent witness. (*Wagn. Stat.* 1373, § 5; *Hardy v. Matthews*, 42 Mo. 406.)

BLISS, Judge, delivered the opinion of the court.

The plaintiffs filed in the Circuit Court of Buchanan county a petition for partition of certain town lots in the city of St. Joseph, owned by them and the defendants, originally named as heirs of Henry P. Poindexter, deceased, late of Richmond, Virginia. Upon their own motion, Patsey Quarles and A. P. Halladay are made parties, and set up a claim to the whole property, alleging that the said Poindexter purchased it with their money, and, without their consent, took a conveyance to himself. This allegation was denied, and, upon hearing, the Circuit Court found it unsustained



by the evidence, and gave judgment of partition between the original parties, which judgment was affirmed in the District Court.

Were this one of those questions, so far as the main fact is concerned, upon which the court would be bound to carefully weigh and decide upon the preponderance of evidence, we might perhaps be warranted in saying that the money used by Poindexter in the purchase of the lots probably belonged to Mrs. Quarles, or to her and Halladay. But it is not thus that the strong presumption arising from a deed can be rebutted. There is no doubt that a trust will ordinarily result in favor of one whose money is used by another in the purchase of land, when the conveyance is taken to himself instead of the person who furnished the money; nor is there any doubt that the facts that create the trust may be proved by parol. For a long time the courts refused, and they have always hesitated, to permit the language of a deed to be thus contradicted, and a title created contrary to the statute of frauds. But while admitting such evidence for the purpose of creating this resulting trust, the chancellor has always required that it be clear and unequivocal. The insecurity of titles and the temptation to perjury, among the chief reasons demanding that contracts affecting lands should be made in writing, also imperatively require that trusts arising by operation of law should not be declared upon any doubtful evidence, or even upon a mere preponderance of evidence. There should be no room for a reasonable doubt as to the facts relied upon. (*Baker v. Vining*, 30 Me. 121; *Malin v. Malin*, 1 Wend. 625; *Sewall v. Baxter*, 2 Md. Ch. 447; *Hollida v. Shoop*, 4 Md. 465; *Boyd v. McLane*, 1 Johns. Ch. 582; *Enos v. Hunter*, 9 Ill. 211.)

Was there, then, such clear and unequivocal evidence that the purchase money of the property in question belonged to Mrs. Quarles and Mr. Halladay as to authorize a declaration of trust in their favor? Affirmatively, there are several witnesses who testify that Poindexter failed in business in 1837 and lost everything; that he was assisted by the defendant, Mrs. Quarles, and that for some twenty-five years before his death, which happened in 1863, he managed her business, including the carrying on of a large farm in Spottsylvania county; that the farm yielded a

net income of some \$6,000 a year ; that he received for his services no special salary or proportion of profits, but lived on the most intimate and friendly terms with his aunt, and was permitted to spend and appropriate whatever he chose. They, or some of them, also testify that Poindexter said at different times that he had purchased and was about to purchase land in Missouri for his aunt, and also that he said that Halladay had furnished part of the money ; and one or two identified the land spoken of as lots in St. Joseph. All the evidence as to the material fact that he used the money of the present claimants of the land, and purchased for them, consisted in testimony as to his declarations while living, as to his insolvency in 1837, and as to his being the general manager of Mrs. Quarles' business.

Before considering the evidence and circumstances that rebut the present claim of Mrs. Quarles, it should be remarked that all the evidence that Poindexter used her money in making the purchase in question, is hearsay and inconclusive in its character. Our experience shows the ease with which the declarations of a deceased person may be proved, and warns us not to place too great reliance upon them. Evidence of such declarations, it is true, is admissible, but it never amounts to direct proof of the facts claimed to have been admitted by those declarations ; and it is sometimes doubted whether it ought to be received at all when introduced for the purpose of divesting a title created by deed. If, however, these declarations were properly sustained by other circumstances — as by evidence that the claimants' money was placed in the hands of deceased for investment, and that the property was treated by the parties interested as their property, or by any other facts pointing to them as the equitable owners — they would warrant us in sustaining the claim. But, instead of this, all the circumstances relied upon to sustain the declarations of Poindexter are consistent with his ownership, and, in addition, the conduct of the principal witnesses and the parties in interest are inconsistent with their claim.

The chief circumstance relied upon by the claimants is the fact that Poindexter was for many years the general manager of Mrs. Quarles' property, and it is assumed from that fact that this pur-

chase was made for her. But we have seen that he looked after and managed her affairs for over twenty years; that the income was large, and that he was permitted to take whatever he pleased as compensation for his services. Are we bound to assume that, while competent to acquire a property for himself, he was, for a bare livelihood, giving the best years of his life to the interests of his kinswoman, and that during all this long period he had no money or property he could call his own?

But even if this evidence standing alone should be held sufficient to sustain the claim, the record shows other circumstances that greatly weaken its force. This property was purchased in 1857, six years before the death of Poindexter, and there is no evidence that either he or the claimants treated it or regarded it as other than his own. He made a will giving all his property to his sister, the wife of Halladay, but no allusion is made to these lots; and if he had regarded them as belonging to the present claimants, it would have been very natural to have provided for their restoration to their true owners; and Halladay, who was the executor, gave a heavy bond to execute the will—a bond which could only have been warranted by the supposition that the deceased left a valuable estate. But further: upon finding that the will was informally executed, and would be inoperative in Missouri, in 1867 and four years after the death of Poindexter, Mr. and Mrs. Halladay opened a correspondence with his heirs for the purpose of purchasing their interest in the property in dispute. Both of them distinctly recognize it as the property of deceased, and no suggestion is made that Mrs. Quarles has or ever had any interest in it. Thus, for over ten years after its original purchase, the deed was treated as indicating the true ownership of the property. It appears that the deceased and Mrs. Quarles and Mr. and Mrs. Halladay all lived together in one family, and their relations were of the most confidential character. Had this property been at that time regarded as not belonging to the deceased—as being, in fact, the property of Mrs. Quarles and Mr. Halladay—is it possible that its title would not have been arranged, especially when Poindexter was about to die in their midst? and especially is it possible when, as the correspond-

ence shows, Mr. and Mrs. Halladay were keenly disappointed in finding the will inoperative, that they would have omitted to set up the present claim to the property if any such claim had then entered their minds?

Objection was made to the introduction of those letters as evidence, but the writers were the principal witnesses for Mrs. Quarles, the proper foundation was laid by questions in regard to them, and they were clearly competent to contradict the witnesses by showing that when they were written they did not then suppose that Mrs. Quarles had any interest in the property.

The depositions of Mr. and Mrs. Halladay were permitted to be read in favor of the claim of Mrs. Quarles, but were ruled out as to that of Mr. Halladay. Had they been admitted to sustain both claims, the evidence to sustain the alleged advance by Halladay would have been much stronger than to sustain that of Mrs. Quarles. For he not only positively testifies to the advance, but a sufficient reason is given in his wife's expectancy of Poindexter's property why he should acquiesce in leaving it in his hands; and in the letter before referred to he expressly asserted it and claimed reimbursement. The ruling out of these depositions is assigned as one of the errors of the Circuit Court, and we have to consider whether this action is warranted by the statute.

The testimony of Halladay was not excluded because he was a party to the record, but because of the death of Poindexter, against whose heirs he was prosecuting his claim. The case comes clearly within the spirit as well as letter of the statute (Wagn. Stat. 1372, § 1). Poindexter was dead, and was unable to give his version of the transaction. To permit the other party to testify would be to try the case upon the statement of one of the parties "to the cause of action in issue," and is expressly prohibited. (See *Stanton v. Ryan*, 41 Mo. 510.)

The testimony of Mrs. Halladay on behalf of her husband was also properly excluded, as the issues did not fall within any of the cases provided for in section 5, p. 1373, Wagn. Stat., when she may be a witness. There was some evidence offered and received on behalf of the plaintiffs which should have been rejected, but as this is in the nature of a chancery proceeding,

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State of Missouri v. Murphy.

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where the facts are to be found by the court, it is our duty to weigh the evidence in regard to them; and, in doing so, we have no hesitation in saying that the Circuit Court was fully warranted, without regard to this improper testimony, in arriving at its conclusion.

The other judges concurring, the judgment will be affirmed

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STATE OF MISSOURI, Defendant in Error, v. EDWARD R. MURPHY,  
Plaintiff in Error.

1. *Practice, civil — Continuance, affidavit for — Diligence.* — Where a cause was continued from one term to another, and no orders were made for the issuing of subpoenas for witnesses till three days before the second time set for trial, an affidavit which showed, in addition, merely that the applicant for continuance on one occasion "searched all through" the town where witness resided without being able to find him, showed no sufficient diligence.

*Error to Fifth District Court.*

*Tutt, Hereford & Pike*, for plaintiff in error.

*H. B. Johnson*, Attorney-General, for defendant in error.

WAGNER, Judge, delivered the opinion of the court.

The defendant was prosecuted before a justice of the peace in Buchanan county for an assault and battery committed upon the person of one Mrs. Mary Hinman, and was found guilty and fined in the sum of five dollars and costs. From the judgment of the justice's court he appealed to the Circuit Court, and, upon a trial there, the jury found him guilty and assessed his punishment at a fine of one hundred dollars. The case was then taken to the District Court, where the judgment was affirmed, and the defendant brings error to this court.

There is but one question urged or relied on for a reversal, and that is the refusal of the court to grant a continuance. At the first term of the court at which the case was triable, a continuance was granted on application of the defendant. At the



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Hutchinson v. Cassidy et al.

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second term he again applied to continue, and his application was overruled. The record shows that no order was made for the issuing of subpoenas for witnesses till three days before the time at which the cause was set for trial. In his affidavit the defendant states that he made a trip to Kansas to ascertain where Barnes, the absent witness, resided, and was there informed that he lived in St. Joseph; that upon his return he searched all through St. Joseph and was unable to find him. This, certainly, does not disclose sufficient diligence. If the witness resided in St. Joseph, for aught that appears he may have been temporarily absent at the time the search was made and when process was issued. The whole time was permitted to intervene between two terms of court, without any steps being taken to pursue the legal course to obtain the attendance of the witness. Had the subpoena been issued in time, as it seems to be admitted that the witness lived in St. Joseph, service would most probably have been had. As it is, we think the defendant was guilty of negligence.

There is nothing to show that the court exercised its judgment and discretion unwisely or oppressively. I think the defendant would have acted wisely had he paid the trifling fine of five dollars, and not exhibited his litigious spirit in a case which at best reflects no credit upon him.

Judgment affirmed. The other judges concur.

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EDWARD HUTCHINSON, Appellant, v. JAMES A. CASSIDY AND  
LINN COUNTY, Respondents.

1. *Contracts — Private sale by sheriff, under order of County Court, invalid, and may be disproved by parol evidence.* — A sale of land by the sheriff, under order of a County Court, at private sale, is invalid; and it is immaterial that the order did not require a public sale. The sheriff is imperatively controlled by the requirements of the statute (Wagn. Stat. 867, § 3).

And when, in suit against a county for specific performance of the contract of sale, it appeared from the certificate of sale by the sheriff that the land was sold at public auction, the county is not conclusively bound by the said recitals, but may show by evidence that in fact such sale was a private one.

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Hutchinson v. Cassidy et al.

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*Appeal from Fourth District Court.*

*G. D. Burgess*, for appellant.

I. Even if the sheriff sold the land at private sale, he did not transcend his authority. (Wagn. Stat. 867, § 3.)

II. The defendants, Linn county, and Cassidy claiming under it, are estopped from denying that the land was sold by the sheriff at public sale, by the recitals in the sheriff's certificate. (2 Washb. Real Prop. 488, § 51; Wash v. Willard, 13 N. Y. 389; 4 Kent, 283; Stowe v. Win, 7 Conn. 214; Carver v. Jackson, 4 Pet. 83; Jackson v. Parkhurst, 9 Wend. 209; McClerhy v. Leadbeater, 1 Kelly, 551; Bean v. Parker, 17 Mass. 591; Wilkerson v. Scott, *id.* 247; Ketes' Heirs v. Shrader, 3 Litt. 447; Pennington v. Northern Ill. R.R. Co., 46 Ill. 297; Smith v. Price, 39 Ill. 28; Marshall v. Gridley, 46 Ill. 247.)

III. The parol evidence to contradict the recitals in the certificate of purchase issued by the sheriff to Hutchinson, especially when offered by the county, should have been rejected. Such evidence is inadmissible. (1 Greenl. Ev. 312, § 275; Reed v. Heirs of Austin, 9 Mo. 731, and authorities cited; Caldwell v. Layton, 44 Mo. 221; Jackson v. Gray, 12 Johns. 428; Jackson v. Vanderhayden, 17 Johns. 168; Stowe v. Vance, 6 Ohio, 249.)

*A. W. Mullins*, for respondents.

I. The sheriff had no right to sell the land at private sale. (Wagn. Stat. 867, § 3.) Such sale was invalid, and the plaintiff acquired no right to the property thereby. (McCormick v. Fitzmorris, 39 Mo. 31; Veorhies v. Bank of United States, 10 Pet. 449, 474-9; Moreau v. Detchemendy, 18 Mo. 522; Moreau v. Branham, 27 Mo. 351; 1 Sto. Eq., § 177.)

II. The rule as to contradicting written contracts does not apply where the action is between a party to the contract and a third person. Therefore the evidence contradicting the recitals in the sheriff's certificate to the plaintiff was proper and competent for that purpose. (1 Greenl. Ev., § 279; 2 Phill. Ev. 697. 4th Am. ed.; 2 Pars. Cont. 556-7, 5th ed.)

BLISS, Judge, delivered the opinion of the court.

On the 7th of August, 1866, the County Court of Linn county made an order directing the sheriff to "proceed and advertise and sell the swamp and overflowed lands belonging to Linn county, commencing on the 10th day of September, and continuing said sale from day to day until all is sold," etc., etc. The sheriff gave plaintiff a regular certificate of sale under said order, for eighty acres of such land, reciting that he offered the same for sale at public auction at the door of the court-house, etc.; that the plaintiff was the highest and best bidder for the same, having bid \$160, giving security, etc.

The plaintiff brought his action for a title, making Cassidy, who subsequently purchased of the county, a party. The court below found that the sale was not made by the sheriff at the time of the public sale, as recited in his certificate, but three days thereafter, and at private sale, and it thereupon held the sale to have been invalid and not binding on the county. The plaintiff makes various objections to this holding, and claims, first, that the order of the County Court did not require that the sale should be at public auction. But the statute does require that the sale should be "at public vendue, to the highest bidder," and the sheriff was imperatively controlled by its requirements (Wagn. Stat. 867, § 3), and it does not matter whether the order of the County Court contained the requirement or not. Second, the plaintiff objected, upon the trial, to any evidence contradicting the recitals of the sheriff's certificate, and claims that the county and those who hold under it are conclusively bound by them.

The general subject of the power of public officers to bind the public by their official acts, and the necessity of conforming to the law in order to give any validity to their action, has been recently considered at length by this court in *The State v. Bank of Missouri*, 45 Mo. 528. We do not understand that the present plaintiff contests the doctrine of that case, or claims that if the law requires a sale at public vendue, a private sale would be valid only as made so by a falsehood on the part of the officer. And he now comes into a court of equity and demands a specific per-

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McCaul v. Kilpatrick.

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formance of a contract by the county, void in itself, and which can only become a contract through such falsehood. The claim has the merit of boldness, but does not appeal very strongly to the conscience of the court. In all this class of cases the public officer, if he is conscious of violating the law, will almost as a matter of course make correct papers; and if courts could not go behind them, the public would be placed almost entirely at his mercy. His personal responsibility would afford but a slight remedy.

The doctrine of estoppel, insisted upon by plaintiff's counsel, has no application to the case. A man may be estopped from disputing the recitals of his own deed, but he is not estopped from disputing the unauthorized declarations or acts of his agent. As well might a mere private agent or attorney in fact disregard his authority, and, in order to make his infidelity effectual, recite a known falsehood in a transfer of his principal's property to a fellow-conspirator; and to make the analogy complete, the purchaser should come into a court of equity and ask the chancellor to enforce the transfer because of this known false recital. In the case at bar, there is no evidence of actual fraud; but we can seldom know whether it exists or not, and our only safety is in holding agents to their authority, and giving effect to no departure from it.

The point made in regard to the equity of Cassidy is of no importance whatever, as it does not matter in the least whether the county subsequently disposed of the property or not.

The judgment is affirmed. The other judges concur.

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PETER MCCAUL, Defendant in Error, v. JACOB KILPATRICK,  
Plaintiff in Error.

1. *Lands and land titles — Tenant in common, title under.*— The conveyance of "one-fourth" of a tract of land, without designating by metes and bounds, or otherwise locating the part conveyed, vests in the grantee and those claiming under him the title to one undivided fourth of the whole tract, as tenant in common with the grantor; and the grantee can not obtain partition of the

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McCaul v. Kilpatrick.

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tract and locate his interest without legal process or consulting his co-tenant. This could only be done where the deed was open to construction as to what particular portion of the tract was meant to be conveyed, or where it might be held to inure in different ways. But the case supposed would be no subject for construction or the application of the doctrine of inurement.

*Error to Fifth District Court.*

*D. J. Heaston*, for plaintiff in error.

I. The deed from defendant to Dodge had the effect to make Dodge and those claiming under him tenants in common. (Adams v. Frothingham, 3 Mass. 352; 1 Washb. Real Prop. 416, "Tenants in Common," § 3; Co. Litt., § 299; Pipkin v. Allen, 29 Mo. 229.)

II. One tenant in common can not maintain trespass against his co-tenant for injury to the joint estate. (4 Kent's Com. 370, 411, 9th ed.)

III. One tenant in common can not select and hold, or convey by metes and bounds, a distinct portion of the estate, because the same would prejudice his co-tenant, or hold his co-tenant out of the possession. (4 Kent's Com. 408, 9th ed.; 1 Washb. 417; 2 Washb. 417; 1 Greenl. Cruise's Dig. 402, note 1; Prim et al. v. Walker, 38 Mo. 94, and authorities cited on pp. 97-8; Bartlett v. Harlow, 12 Mass. 348; Duncan v. Sylvester, 24 Me. 482; Griswold v. Johnson, 5 Conn. 363; Dorn v. Dunham, 24 Texas, 366; Whitton v. Whitton, 38 N. H. 127; Allen v. Hall, 50 Me. 253; Waite v. Richardson, 33 Verm., 4 Shaw, 190.) Even if a tenant in common would have the right to select certain parts of the common property, it would be necessary to make some record of such selection, and give notice of such selection to his co-tenant. Nothing of the sort was done in the case at bar.

*Howell & Harrington*, for defendant in error.

I. Defendant in error had a right to elect in what part of the tract of land particularly described in the deed to him he would take the one-fourth part conveyed to him; and when he made the election it was binding and conclusive upon plaintiff in error, and defendant in error became the exclusive owner. (See Blackw.



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McCaul v. Kilpatrick.

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Tax Tit. 382-3; 9 East, 15; 4 Wend. 58; 2 Smith's Lead. Cas. 448; Jackson v. Hudson, 3 Johns. 375; Jackson v. Blodgett, 16 Johns. 172; Jackson v. Gardner, 8 Johns. 394; Clint. Dig. 931, § 225; *id.* 917-18, §§ 81-2.)

II. Ownership draws to it the possession, there being no actual adverse possession, and constructive possession is sufficient to sustain this action (2 Greenl. Ev. 614; 1 Hill. Torts, 942, § 5, note *c*; *id.* 522, § 19), but defendant in error was in actual possession. (1 Hill. Torts, 523, § 19.)

III. The general rule, that one tenant in common can not maintain trespass against another in common, does not apply; for on the survey and election by defendant in error, the parties ceased to be tenants in common if they ever had been such, and defendant in error became the exclusive owner. (See authorities above cited.)

IV. If the grantor had not the right of election in such a case, he would be put to the trouble and expense of a partition suit to determine and obtain his rights. He would be exposed to the hazard of entirely losing the land, the particular thing he might want and had bargained for, for the land itself could doubtless be sold under the report of the commissioners. This court will not expose a grantee to such delay, expense, and hazard for the fault of the grantor. (See authorities above cited.)

CURRIER, Judge, delivered the opinion of the court.

This is an action of trespass *quare clausum*. It appears from the agreed case which was read in evidence to the jury that the plaintiff acquired from the defendant, through several intermediate conveyances, title to one-fourth of a twenty-acre tract of land; the particular fourth not being specified in the conveyances. The agreed case further shows that the plaintiff, subsequently to his acquisition of title, "procured the county surveyor, and marked out and selected five acres in the southwest corner of said twenty acres, in the absence and without the knowledge or consent of the defendant." After this the defendant entered upon the five acres so selected and removed some fence rails, and that is the trespass complained of.

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McCaul v. Kilpatrick.

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The case shows that the parties were tenants in common. The original conveyance of one-fourth of the twenty acres, without designating by metes and bounds, or otherwise localizing the part conveyed, vested in the grantee the title to one undivided fourth of the whole tract, as tenant in common with the grantor; and those who subsequently acquired the grantee's title assumed the same relation to the remaining three-fourths of the title as the original grantor originally held. (*Pipkin v. Allen*, 29 Mo 229; *Adams v. Frothingham*, 3 Mass. 352; *Jackson v. Livingston*, 7 Wend. 136; 1 Washb. Real Prop. 563, 8th ed.)

The parties being tenants in common, how could the estate be partitioned between them? At common law, one tenant in common could not enforce a division of the estate against his co-tenant, in opposition to the latter's will. In England a partition is effected through chancery, but in this country the subject is generally regulated by statute. (1 Washb. Real Prop. 580.) Our statute points out the steps to be taken in effecting the separation of joint estates.

But the plaintiff claims the right to make partition without legal process, and without consulting his co-tenant. This supposed right is founded on the defendant's original deed, which failed to locate the fourth part of the twenty acres in a body by itself. The grantee, it is therefore claimed, and those claiming under him, acquired the right to locate the five acres in any way most advantageous to them, and upon the principle that a deed is to be construed most strongly against the grantor, and also upon the ground that where a deed may inure in different ways the grantee may take it in that way which shall be most beneficial to him. *Jackson v. Hudson*, 3 Johns. 374, and *Jackson v. Blodgett*, 16 Johns. 172, and other similar cases, are cited and relied upon as supporting the views contended for. The principle declared in these cases is correct, but has no application to the case at bar. The deed in question is not open to construction. There is no doubt about its meaning or effect, nor can it inure in different ways. The doctrine of inurement has no application to the instrument. The deed vests in the grantee directly an inde-

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Harris v. Turner et al.

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feasible title in fee simple to one undivided fourth part of the twenty acres, as a tenant in common with the grantor.

In *Jackson v. Livingston*, 7 Wend. 136, it was decided, where a deed granted 600 acres of land, to be surveyed or taken off from a larger tract, and by the terms of an instrument referred to in the deed, the tract was to be divided into lots of 100 acres each, and an election of lots was given to the grantees, which they subsequently made, and followed up by possession, that such election and possession under the deed operated as a parol partition, although the grantees were tenants in common with the owners of the larger tract. But that is not this case. The radical difference between the two is sufficiently manifest not to require pointing out.

The view we have taken of the case disposes of it, and renders unnecessary any reference to the other points noted in the briefs of counsel. It is not claimed that one tenant in common can maintain trespass against his co-tenant for an entry upon and enjoyment of the common property. (4 Kent, 421, 10th ed.)

The judgment will be reversed and the cause remanded. The other judges concur.

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**JAMES HARRIS, Respondent, v. ASA TURNER AND JOHN L. HOUCK, Appellants.**

1. *Forcible entry and detainer—Entry and planting crops on lands of another—Forcible ouster—Remedy.*—Where A. has entered upon the land of B. and planted a crop, and was in peaceable possession of the same, no superior right of B. could justify him in ousting A. by force; and in case of such ouster, A. would be entitled to recover possession in an action for forcible entry and detainer.
2. *Forcible entry and detainer—Occupancy of part of tract of land—How construed as to whole tract, in first instance—How in case of intrusion.*—The occupancy of a part of an inclosure by planting crops would naturally be construed as indicating an intention to hold possession of the whole field, and it would be sufficient for the purpose of an action of forcible entry and detainer to show such possession in the first instance; but where plaintiff was shown to be a mere intruder, the rule is different, and his possession should be held to be confined to the land actually in cultivation.

*Appeal from Fourth District Court.*

*Carr & Easley*, for appellants.

*Burgess*, for respondent.

BLISS, Judge, delivered the opinion of the court.

This is an action of forcible entry and detainer, and the defenses, as embodied in various declarations of law, were all overruled by the court. First it was urged that the plaintiff's entry was wrongful, and hence he could not maintain the action. He went into a field near his cabin, and, without leave, plowed, and planted about eight acres in corn and potatoes. No right to thus enter appears, and the question is presented whether a person thus in possession can maintain this action against one who forcibly dispossessed him, even though the dispossessor had a right to the possession.

The construction of the statute in this regard has been uniform. The property rights of the parties can not be decided in this form of action. If the plaintiff was in peaceable possession, whether rightfully or wrongfully, the defendants had no right to forcibly dispossess him. If their statements in regard to his entry are correct, they could in a few days have lawfully turned him out, and a loss of his crops would have been the penalty for his wrongful entry. To permit men to redress their own wrongs by forcibly turning out those who had wrongfully obtained possession of lands, would defeat one of the objects of the statute. It is an act of peace, and designed to prevent its breach, and the courts of the State have ever given it a construction that should remove all excuse or temptation for men to take the law into their own hands. If, therefore, the plaintiff had entered upon the land and planted a crop, and was in peaceable possession of the same, no superior right of defendants could justify them in ousting him by force. (King's Adm'r v. St. Louis Gaslight Co., 34 Mo. 341; 34 Krevet v. Meyer, 24 Mo. 110; Beeler v. Cardwell, 39 Mo. 72.)

But the court committed an error in rendering a judgment for the whole quarter-section in connection with its refusal to give



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Harris v. Turner et al.

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the following declaration of law asked by defendants, to-wit: "If the court, sitting as a jury, find that the plaintiff has failed to show any authority to enter upon said premises, or any color of title thereto, then his possession is confined to that portion of the field in his actual occupancy; and, should the court find for the plaintiff, he is entitled to recover only such portion of the field as the evidence shows him to have been in the actual occupancy of." This declaration was not strictly correct as an abstract proposition, for the occupancy of part of an inclosure by cropping would naturally be construed as indicating an intention to hold possession of the whole field; and it would be sufficient to show such possession in the first instance. Still, with the undoubted facts of this case, the judgment was altogether too comprehensive. It included not only the eight or ten acres planted by the plaintiff, and the whole field, but the balance of the 160 acres, including the cabin occupied by him. As a mere intruder the plaintiff's possession should be held to have been confined to the land actually in cultivation; and if the declaration of law had been predicated upon an unlawful entry by the plaintiff, it would have been strictly correct. But it will not do to say, where a plaintiff in this form of action relies in the first instance upon possession only, without exhibiting or claiming authority or title, such possession shall, under that state of facts, be held to have been only of that part of a field he has actually planted. But if the evidence shows an unlawful intrusion by the plaintiff, his possession should be restricted to what he actually occupies. In the latter case he should certainly not be held to be possessed of more than he has actually seized. It is going a great way to give him any standing at all in court, and no constructive advantage should be given him.

If we had a description of the land planted by the plaintiff we would reform the judgment instead of sending the case back. But the record fails to advise us with sufficient certainty in regard to it; nor are we able to say, as suggested by counsel, that the judgment, extensive as it is, will not harm the defendants.

The other judges concurring, the judgment is reversed and the cause remanded.



MARY J. BURCH *et al.*, Appellants, v. J. N. BROWN *et al.*,  
Respondents.

1. *Wills*—Devise to stranger in blood, with no mention of children, a nullity.—A will bequeathing the whole of testator's estate to an entire stranger in blood, without naming or in any wise mentioning or providing for the heirs, under the statute of wills (Wagn. Stat. 1865, § 9), is entirely void. The estate would descend to the heirs under the statute of descents and distributions, and the devisee would take nothing. The words used in the closing paragraph of section 9, *supra*, requiring "all the other heirs, devisees, and legatees to refund their proportional parts," did not give him an equal part with the other heirs. The devisees there referred to are heirs who would take a distributive share in the event that he died intestate. They have no application to a case of a stranger, where the whole will is a nullity.

*Appeal from Fourth District Court.*

*Lipscomb & Anderson*, for appellants.

As to her children and grandchildren, Mrs. Donnelly died intestate, and, as against them, the stranger in blood, Hall, took nothing. The will should be declared void as against plaintiffs. (Bradley v. Bradley, 24 Mo. 311; Hill v. Martin, 28 Mo. 79; Chouquette v. Barada, 28 Mo. 491.)

*Brown, Williams & Henry*, and *Williams*, for respondents.

While as to plaintiffs in error the deceased died intestate, yet the will is valid, except so far as to let said heirs at law have of the inheritance an equal part with the devisee. The will is not wholly avoided by the omissions. (R. C. 1855, ch. 131, p. 538, §§ 2, 9.)

WAGNER, Judge, delivered the opinion of the court.

The only question in the record depends upon the construction to be given to the ninth section of the statute of wills, and that seems to have been definitely settled in the case of Bradley v. Bradley, 24 Mo. 311. The case shows that in 1862 Malinda Donnelly died in Macon county, possessed of considerable real and personal property, and some time subsequent to her decease a paper was found purporting to be her last will and testament,

whereby she devised and bequeathed her whole estate to one Thomas Hall, an entire stranger to her in blood. Hall afterward died unmarried and without children, and whatever estate he took under the will descended to nephews and nieces, his heirs at law, who are the defendants in this suit.

The will was admitted to probate in the Probate Court of Macon county. The plaintiffs, who are the grandchildren of Malinda Donnelly, and her only heirs at law, are not named or in any wise mentioned or provided for in the will, and they brought suit in the Circuit Court to set aside the will, claiming the entire estate. The court sustained a demurrer to the petition, holding that Hall took, as devisee under the will, and was entitled to one-third part of the estate. This view was also taken by the District Court.

The ninth section of the present statute in regard to wills provides that if any person make his last will, and die, leaving a child or children, or descendant of such child or children (in case of their death), not named or provided for in such will, although born after the making of such will or the death of the testator, every such testator, so far as shall regard any such child or children, or their descendants, not provided for, shall be deemed to die intestate; and such child or children, or their descendants, shall be entitled to such proportion of the estate of the testator, real and personal, as if he had died intestate, and the same shall be assigned to them; and all the other heirs, devisees, and legatees shall refund their proportional parts. (2 Wagn. Stat. 1365, § 9.)

The law declares in the most express and explicit terms that if the child, children, or their descendants, be not named or provided for by the testator, such child or children, or their descendants, shall be entitled to such proportion of the estate, real and personal, as if the testator had died intestate. Now, had the testatrix, Malinda Donnelly, died intestate, it is obvious that, under our law of descent and distributions, the plaintiffs would have been entitled to the whole estate.

This very section of the statute, which was numbered 11 in the code of 1845, received a thorough consideration and definite construction in *Bradley v. Bradley*, *supra*. There the testator,

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Burch et al. v. Brown et al.

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Bradley, died, leaving real and personal estate, all of which he devised and bequeathed to his wife. No mention was made in the will, of the children or heirs, nor were they provided for in any manner. The heirs and children of the testator, Bradley, brought suit against the widow, claiming that the will was a nullity, and asking to have dower assigned to her. Upon the trial in the Circuit Court, at the request of the plaintiffs, the court gave the following declaration of law: "That the will read in evidence makes no provision for the children and heirs of Thomas P. Bradley; nor is either of them named in said will; and, by the laws of this State, said Thomas P. Bradley died intestate as to said children; and said children and heirs are entitled to partition of his property, as if he had died without making a will." Judgment was then given for the plaintiff, and the will was held to be entirely void, and that the widow was only entitled to dower, which the statute gave her without reference to any will. The judgment was affirmed in this court, the judge who delivered the opinion declaring that, as to the children of the testator, the will was a mere blank. That case is exactly in point and wholly parallel with the one we are now considering, except that there the widow was the recipient of the testator's bounty, and here it is an utter stranger.

It seems to have been supposed that the concluding paragraph of the section, which says that "all the other heirs, devisees, and legatees shall refund their proportional parts," gave to the devisee, Hall, an equal part with the other children. But this is a misapprehension of the true meaning of those words. Taken in connection with the whole context, it is easy to perceive that they have reference to where the testator makes devises and legacies to heirs who would take a distributive share in the event that he died intestate; but they have no application to the case of a stranger, where the whole will is a nullity, or, as Judge Ryland says, a blank. Destroy the whole will as to those who are not named or provided for, and they are entitled to come in on equal terms with those who have been preferred and advanced by the testator's bounty. The devisees and legatees in such a case are not disinherited, but, instead of taking under the will, they are

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Harvie v. Turner.

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only entitled to the share given them by the statute, and all over and above that they must refund to those who have not been provided for, so as to place them all on an equality. But a stranger must claim under and derive title from the will, else he gets nothing; and where the will is a nullity, or becomes inoperative, the devise or bequest to him fails.

Judgment reversed and cause remanded. The other judges concur.

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LOUIS E. HARVIE, Respondent, v. OTIS A. TURNER, Appellant.

1. *Forcible entry and detainer*—Term "cabin" in action of, construed to mean what.—A suit for forcible entry and detainer is for the possession of real property; and where the record in such a proceeding showed that the suit was for the possession of "a certain cabin situated, standing, and being upon the southwest quarter-section," etc., held, that the action included not merely the cabin, but the ground inclosed by it.
2. *Forcible entry and detainer*—Action of, does not affect title to premises.—The adjudication in an action for forcible entry and detainer in no way affects the title to the premises or the right to their possession.
3. *Forcible entry and detainer*—*Res adjudicata*.—The issue embraced in a suit for the forcible entry and detainer of certain premises can not be re-tried after judgment, because the subsequent suit may embrace premises not included in the first. The consequences of the first judgment could not be escaped by a mere enlargement of the claim.
4. *Landlord and tenant*—*Principal and agent*—*Res adjudicata*—*Identity of parties in different suits*.—If an agent or tenant were sued, and the principal or landlord had notice of the pendency of the suit, and an opportunity to come in and cross-examine the witnesses and make defense to the action, and in a subsequent suit, involving the same subject-matter, the principal or landlord were made a party directly, yet the identity of the parties would be sufficient to establish a *res adjudicata* as to the litigants in the second suit.

*Appeal from Fourth District Court.*

G. D. Burgess, for appellant.

I. The previous judgment was admissible, though not between the same parties on the record. The rule which renders a prior judgment conclusive on the parties thereto, is not restricted to those who bear that relation on the record; but it includes all who



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Harvie v. Turner.

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have an interest in the subject-matter of the suit, and a right to make a defense or control the proceedings. (State, to use of Hempstead, v. Coste *et al.*, 36 Mo. 437; 1 Greenl. Ev., § 523; Castle v. Noyes, 14 N. Y. 329.)

II. Tenants are privies in law. (1 Greenl. Ev., § 189; Castle v. Noyes, *supra*.)

III. The fact that the record shows the former suit to have been for a cabin on the land in controversy, while the present suit is for the land itself, does not affect the admissibility of the record. Supposing, for argument's sake, that the subject-matter of the two suits is not the same, the record is none the less admissible. The judgment of a court of competent jurisdiction is conclusive in a second suit between the same parties or their privies, on the same issues or questions, although the subject-matter may not be the same. (State, to use of Hempstead, *etc.*, *supra*; Doty v. Brown, 4 N. Y. 71; Castle v. Noyes, *supra*; 2 Phil. Ev., note 262, and cases cited; Bouchaud v. Dias, 3 Denio, 243.)

IV. The parol evidence offered to explain the record should have been admitted. (1 Greenl. Ev., § 523; 2 Phil. Ev., *supra*; 2 Smith's Lead. Cas. 574; Gardner v. Buckbee, 3 Cow., N. Y., 120; Burt v. Steinburgh, 4 Cow., N. Y., 559; Young v. Rummell, 2 Hill, N. Y., 478; Doty v. Brown, 4 Comst., N. Y., 71; Young v. Black, 7 Cranch, 565; Washington Packet Co. v. Sickels *et al.*, 24 How. 333; Miles v. Caldwell, 2 Wall. 35; Packet Co. v. Sickels, 5 Wall. 580; State v. Thornton, 37 Mo. 360; Zimmerman v. Zimmerman, 16 Ill. 84; Gray v. Gillilan *et al.*, 15 Ill. 453; Phillips v. Birch, 16 Johns. 136; King v. Chase, 15 N. H. 13; Vallandigham v. Ryan, 17 Ill. 29; Standish v. Parker, 2 Pick. 22; Parker v. Thompson, 3 Pick. 429; Wood v. Jackson, 8 Wend. 44; Parker v. Hall, 2 Pick. 206; Wilson v. Hart, 7 Taunt. 304.)

*Hall*, for respondent.

The Circuit Court committed no error in rejecting the record offered in evidence by defendant. It was between different parties, and related to a different subject-matter. (1 Greenl. Ev.,



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Harvie v. Turner.

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§§ 523-4; 11 Mo. 356; 24 Mo. 109; 3 Marsh. 341; 33 Mo. 86; 29 Mo. 74; 20 Md. 457; 24 How. 553; 11 Ohio, N. S., 131.)

*Kinley*, for respondent.

The record shows that Howe invaded possession of Turner's cabin and ousted him therefrom, on or about the fourth day of April, 1867, while it is claimed that Turner invaded possession of said tract of land entire, and dispossessed and ousted Harvie therefrom, on or about the 20th day of December, 1866; hence neither parties nor subject-matter, in either point of time of the trespass or of *locus in quo*, are the same in the two suits; therefore the record was properly rejected. (1 Espin. Nisi Prius, 43; Church v. Leavenworth, 4 Day's Com. 274-7; Smith v. Sherwood, 4 Conn. 276-82; Bradford v. Bradford, 5 Conn. 127; Haight v. City of Keokuk, 4 Clark, Iowa, 199; Benz v. Huss & Tarr, 3 Kansas, 389-97.)

CURRIER, Judge, delivered the opinion of the court.

This is a proceeding under the statute in relation to forcible entries and detainers, and was commenced in July, 1867. The plaintiff alleges that he was in peaceable possession of the southeast quarter of section five, township fifty-four, range twenty, on the 20th day of December, 1866, and that the defendant on that day forcibly entered and took possession of the premises.

At the trial, the plaintiff having given evidence tending to prove the existence of these facts, the defendant offered to read in evidence the record of the proceedings and judgment in a prior forcible entry and detainer suit, wherein he was plaintiff and one Howe was defendant, for the purpose of showing that the point in issue in the pending suit had been adjudicated. The record thus offered in evidence shows that the first suit was commenced in May, 1867, and that Turner (the present defendant) recovered final judgment therein for the possession of the premises sued for, to-wit: "A certain cabin situated, standing, and being upon the southwest quarter of section five, township fifty-four, range twenty;" being the same quarter-section described

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Harvie v. Turner.

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in the present complaint. In connection with the record, and in explanation of it, the defendant offered further to show by oral proofs:

1. That Howe forcibly entered and took possession of the premises, and held them under Harvie's (the present plaintiff's) authority, and as his tenant.

2. That the action was for the same premises, and that the verdict and judgment therein were rendered upon the same facts and issues, which are involved in the present suit.

3. That Harvie's agent had knowledge of that suit; that he was present at the trial, and assisted actively in the preparation of the defense.

On objection, the court excluded the record and the oral evidence in explanation of it.

Whether this action of the court was warranted and correct, is the main matter for consideration. Its action in this behalf is sought to be defended upon the assumed ground that the subject-matter of the two actions and the parties were different.

1. As to the subject-matter. Possibly a rigidly strict construction of the complaint in the first suit might limit its subject to the cabin superstructure, apart from the land occupied by it. But that is evidently not the sense in which the term "cabin" is there used. The action was founded upon an alleged forcible entry upon and detention of real estate. It was brought to recover possession of real property, and was not an action of replevin to recover possession of a personal chattel. Unless the ground covered and inclosed by the cabin was included, as well as the superstructure itself, the proceeding failed of its purpose, and was wholly nugatory. A fair construction of the record offered in evidence, however, discloses a recovery by Turner (the present defendant) of the locality inclosed by the cabin as well as the cabin building, the two together constituting the "premises" sued for in that action; and to that extent the matters litigated between Turner and Howe in the first suit are *res adjudicata* as to them and their privies. The adjudication, however, in no way affected the title to the premises or the right to their possession. (Beeler v. Cardwell, 29 Mo. 72; Krevet v. Meyer,

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Harvie v. Turner.

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24 Mo. 107.) That suit determined that Turner, as a matter of fact, within the three years next prior to its institution, was in peaceable possession of the cabin inclosure, and that his possession was unlawfully invaded by Howe. These facts can not be litigated over again in a subsequent forcible entry and detainer suit between the same parties, although the subsequent suit may embrace premises not included in the first. This second suit embraces all that was included in the first, and to that extent the identity between the two is perfect and indisputable. It would hardly be claimed that Howe could escape the consequences of the first judgment by a mere enlargement of the claim, suing for all that was embraced in the original litigation and something more. If that could be done, judgments could be rendered of no effect by mere artifice and subtlety. I am of the opinion that the exclusion of the defendant's evidence was not warranted upon the ground of a difference in the subject-matter of the two suits.

2. As to the identity of the parties. By identity of parties, the law does not mean that the parties must be literally and nominally the same. If an agent or tenant were sued in the first action, and the principal or landlord had notice of the pendency of the suit, and an opportunity to come in and cross-examine the witnesses, and make defense to the action, the identity of the parties is sufficient, although the principal or landlord may be the actual party to the subsequent suit involving the same subject-matter. (1 Phil. Ev. 320, notes 111-12, 5th Am. ed., and the cases there cited.)

Whether Harvie had notice of the first suit, whether his agent was present at the trial and participated in the defense, and whether Howe was Harvie's tenant, were all matters to be inquired into; but the court erroneously excluded the proffered proofs, and stopped the investigation. The judgment must therefore be reversed and the cause remanded.

Whether the possession of the cabin inclosure determined the possession of the whole quarter-section, is a question requiring no attention at this time.

As the case goes back for re-trial, it should be further observed that the plaintiff's third instruction is subject to objection as being

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Davis et al v. Perry et al.

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abstract and misleading. It ought not to have been given in its present form. The defendant's fifth instruction is objectionable and was properly refused. It comments on the evidence, and assumes to declare its degree of strength. That was for the jury to determine. The other judges concur.

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SAMUEL C. DAVIS *et al.*, Appellants, v. AUSTIN W. PERRY *et al.*, Respondents.

1. *Attachment—Plea in abatement, appeal will not lie from judgment on.*—Under the present statute (Wagn. Stat. 190, § 42)—amendment of act of 1855 (R. C. 1855, p. 252, § 47)—an appeal will not lie from the judgment of court upon a plea in abatement. (Anderson v. Moberly, *ante*, p. 191.)

*Appeal from Fifth District Court.*

Woodson, Vineyard & Young, for appellants.

H. M. & A. H. Vories, for respondents.

This case is improperly in this court. The judgment appealed from is not a final judgment, the record showing that the only final judgment rendered in the cause was a judgment by the agreement of the parties, from which no appeal was ever taken.

CURRIER, Judge, delivered the opinion of the court.

This suit was commenced by summons. After the defendants appeared and filed their answer, the plaintiffs prayed out a writ of attachment in aid of the suit. One of the defendants thereupon filed a plea in the nature of a plea in abatement to the attachment, raising issues upon the attachment affidavit. These issues were tried by jury, and found for the defendants. Judgment was rendered upon the verdict for the defendants, abating the attachment and for costs. The issues arising upon the petition and answer were then continued by agreement to the next succeeding term for trial. At the succeeding November term judgment was rendered for the plaintiffs for the amount of their

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Ensworth v. Albin et al.

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claim by agreement of parties. This, as the record shows, and as the plaintiffs' counsel assert in their statement, was "a final judgment in the case." Upon its rendition the plaintiffs prayed for and obtained "an appeal from the judgment of the court on the plea in abatement herein."

The judgment on the plea in abatement, as we have seen, was rendered at the previous February term. The appeal was therefore taken, not from the final judgment, but from the prior judgment upon the plea in abatement.

The appeal was not authorized, and the appellants can derive no benefit from it. The statute (Wagn. Stat. 1051, § 1) authorizes appeals from final judgments alone. This appeal not being from such a judgment, can not be maintained. This subject was fully considered and passed upon in *Anderson v. Moberly*, *ante*, p. 191.

The attachment act of December, 1855 (R. C. 1855, p. 252, § 47), provided that when the issues arising upon a plea in abatement in an attachment suit were found for the defendant, the suit should thereupon be dismissed at the cost of the plaintiff. Under that statute, a judgment upon the plea in abatement for the defendant was final and terminated the suit. The present statute (Wagn. Stat. 190, § 42), however, provides that the suit, under the same circumstances, "shall proceed to final judgment on the cause of action therein alleged," the same as though no attachment had been connected with the case.

Judgment affirmed. The other judges concur.

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SAMUEL ENSWORTH, Plaintiff in Error, v. WILLIAM M. ALBIN  
*et al.*, Defendants in Error.

1. *Elections*—Section 18 of act of 1868, touching registration, constitutional.—Section 18 of the act touching registration of voters (Sess. Acts 1868, p. 136) is not in conflict with the State constitution in any of the following particulars:

1. Its subject-matter is sufficiently pointed out and expressed in the title of the act, under section 32, article IV, of the constitution.



## Ensworth v. Albin et al.

2. Its requirement of a supplemental registration to meet the exigency of a special election, is not at variance with the uniformity of registration required by section 4, article II, of the constitution.
  3. It is not in conflict with said section 4, article II, as making such special registration evidence of the right to vote.
  4. It is not unconstitutional on the ground that the neglect of duty on the part of the board of registration might practically work a disfranchisement of voters registered at the regular biennial registration.
  5. It is not in conflict with section 4, article II, because it allows said board up to five, instead of ten days before the election within which to complete the books of registration, unless the "completion of the books" be held to authorize a continued registration of votes down to within five days of the election, and unless it appear that persons cast their votes within the ten days. Even if the act expressly authorized the continuance of the registration to within five days, that would not vitiate the whole enactment, but only that particular part of it.
2. *Mandamus, demurrer to treated as answer—Waiver.*—In proceedings in *mandamus*, where respondent filed a demurrer to the petition instead of an answer to the writ, and relator agreed to accept the demurrer as a return to the writ, and demurred to it accordingly, his agreement and subsequent action constituted a substantial waiver of his objections to the technical correctness of the pleadings.

*Error to Fifth District Court.*

*Ensworth*, for plaintiff in error.

Points of counsel are sufficiently set out in the opinion of court.

*Everett, Reed & Pike*, for defendants in error, cited *State ex rel. Ensworth v. Albin*, 44 Mo. 346; *City of St. Louis v. Teifel*, 42 Mo. 578; *State v. Mathews*, 44 Mo. 523; *State ex rel. Weir v. County Judge*, 2 Iowa, 280; 37 Mo. 330; 2 Conn. 490; 38 Mo. 209; 25 Mo. 125; 21 Penn. 147; 15 Iowa, 305; 4 Dale, 14; 41 Mo. 224-30.

CURRIER, Judge, delivered the opinion of the court.

This is a proceeding by writ of *mandamus* to compel the County Court judges of Buchanan county to issue to the relator a commission as judge of the Common Pleas Court of that county, and is, as respects its subject-matter and the parties, identical with a former suit by the State, upon the relation of *Ensworth*, against the same respondents, reported in 44 Mo. 346. It was

held in that proceeding that the special election, under which the relator claims, was unauthorized and invalid, and that the relator consequently acquired no rights under or in virtue of such election. Upon that ground the peremptory writ was denied. The election was held invalid for the reason that it was not preceded by the special registration contemplated in section 18 of the act of March 21, 1868, in relation to the registration of voters. (Sess. Acts 1868, p. 136, § 18.) It is not now claimed that there was any such special registration, but it is insisted—a point not made before—that the statute requiring the registration is unconstitutional and void. The act referred to is now assailed as unconstitutional in various particulars and upon various grounds:

1. As in conflict with the provisions of article IV, section 32, of the constitution. It is urged that the act contains subjects of legislation which are not expressed in the title. That objection has no application to the eighteenth section. The subject of that section is sufficiently pointed out and expressed in the title, and does not, therefore, fall within the scope of the objection, since the constitution expressly provides on that subject that an “act shall be void only as to so much thereof as is not so expressed.”

2. The special registration provided for in section 18 is supposed to break up the uniformity of registration required by article II, section 4, of the constitution. The uniformity of registration there required has reference to equal and uniform laws regulating registration, which, under like circumstances and conditions, shall have equal and uniform effect in all parts of the State. There is nothing in section 18 of the act of 1868 inconsistent with a uniformity of that character; that is, the requirement of a supplemental registration to meet the exigency of a special election is not at variance with the uniformity required by the constitution. The constitution makes it the duty of the Legislature to provide by law for the registration of all persons who are, by its provisions, qualified to be registered as legal voters. It further requires that “a new registration shall be held once in every two years, and within sixty days next preceding the tenth day prior to every biennial general election.” So much

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Ensworth v. Albin et al.

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the constitution demands, but it nowhere prohibits intermediate registrations "for the purpose of keeping the list of qualified voters complete" for use at special elections. It would be a reproach to that instrument if it contained a prohibition so entirely unreasonable. If the constitution contained no provision on the subject of registration, the Legislature would nevertheless be at liberty and have the power to enact the registration system. It has the same power now as to all matters not prohibited or provided for in the constitution; and there is no prohibition or provision covering the subject of completing the list of voters preliminary to special elections. (See *Sharpless et al. v. The Mayor of Philadelphia*, 21 Penn. 147; *Morrison v. Springer*, 15 Iowa, 304.)

3. It is again objected that the registration act makes that "evidence of a person's right to vote, which the constitution expressly inhibits."

The constitution (art. II, § 4) provides that after a registration has once been made, such "registration shall be evidence of the qualification of all registered voters to vote at any election thereafter held," and that the "fact of such registration shall be in no otherwise shown than by the register or an authentic copy thereof." It was to secure to persons entitled to registration, but who were not registered prior to the last preceding general election, this constitutional evidence of their qualification as voters, that the Legislature, in section 18 of the registration act, provided for a special registration preliminary to special elections. This was proceeding under the constitution and in harmony with it, and not in opposition to its requirements. At the same time it secures to the citizen his right of voting at special elections by placing within his reach the prescribed evidence of his qualifications as a voter.

4. It being held, under the act of 1868, that a special or supplemental registration is a necessary preliminary condition to the validity of a special election, it is urged that neglect of duty on the part of the board of registration might involve the practical disfranchisement of voters who were registered at the regular biennial registration; that is, that the legal voters of the county

or district might be deprived, in the case supposed, of an opportunity to cast their suffrages for the officers to be voted for at the special election. We are referred to no case where a law has been held unconstitutional for the reason that the officers appointed to execute it had neglected their duty or abused their trust; nor are we aware of any principle on which to base such a decision.

5. The relator's fifth position is that section 18 of the registration act "makes voters by registration, where the constitution prohibits it." The constitution (art. II, § 4) provides that "no person shall vote unless his name shall have been registered at least ten days before the day of election." Section 18 of the act in question provides that the board of registration "shall complete the books of registration five days prior to said special election." It is thence inferred that the act assumes to "make voters" down to within five days of the election, in conflict with the constitutional provision which limits the time to ten days. There is no force in this view, unless by "completion of the books" it is intended to authorize the continued registration of votes down to within five days of the election; and it is very questionable at least whether that was the purpose of the Legislature. But if the act expressly authorized the registration to be continued to within five days of the election, that would not vitiate the whole enactment, but only that particular part of it. If the clause in relation to the completion of the books were entirely out of the section, the relator's case would not be thereby strengthened. The point, in fact, has no relevancy to any of the issues in the case. There is no claim that improper parties voted at the election, or that any one was registered in opposition to the requirements of the constitution.

6. The same answer may be made to the relator's sixth proposition, which asserts that so much of the ninth section of the act as authorizes the board of registration to act upon its "own knowledge" in passing upon the qualifications of parties applying for registration, is unconstitutional and void. Suppose that were so, how does the fact bear upon the present inquiry? The case presents no issue as to the action of the board in receiving

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Johnson et al. v. Halladay et al.

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or rejecting applicants for registration. The main point of inquiry is, had the Legislature authority to order a special registration preparatory to a special election? That inquiry has already been answered in the affirmative.

Some question is made as to the technical correctness of the respondents' pleadings. Instead of an answer to the alternative writ, the respondents, in the first instance, demurred to the relator's petition. The relator, however, as the record shows, subsequently agreed to accept the demurrer in an amended form, as a return to the writ. He treated the pleading as an answer, and demurred to it accordingly. The relator's agreement and subsequent action constituted a substantial waiver of his objections.

The judgment will be affirmed. The other judges concur.

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SARAH Q. JOHNSON *et al.*, Defendants in Error, *v.* ALEXANDER R. HALLADAY *et al.*, Plaintiffs in Error.

1 Johnson et al. v. Halliday et al., *ante*, p. 423, affirmed.

*Error to Fifth District Court.*

*T. A. Green*, for plaintiffs in error.

*Winslow Judson*, for defendants in error.

BLISS, Judge, delivered the opinion of the court.

This was a petition for partition of certain lots in St. Joseph, in which said Patsey Quarles and A. R. Halladay interpleaded, claiming a resulting trust in the lands. The same questions are raised by the record which have been considered at this term in another case, but relative to other lots, only in the present case there is another party. The opinion in that case must decide the questions involved in this.

Judgment affirmed. The other judges concur.



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Bedford v. Hannibal and St. Joseph Railroad Co.

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JOHN E. BEDFORD, Appellant, v. HANNIBAL AND ST. JOSEPH  
RAILROAD COMPANY, Respondent.

1. *Corporations — Railroad companies — Negligence, what prima facie case of.*—The fact that the fire which caused the damage sued for was set by a railroad engine would be *prima facie* evidence of negligence by those who ran it, or who provided the engine with its contrivances, and would throw the burden of exonerating them upon the company.

*Appeal from Fifth District Court.*

The first instruction given by the trial court on its own motion, and commented upon in the opinion of this court, was as follows:

"It is the duty of every man to so use his own property as not to cause injury to that belonging to his neighbors; and the fact of fire escaping from the engine of a railroad company and communicating to the property of others, is a fact to be considered by the jury in determining the question of negligence on the part of defendant; and if the jury believe from the evidence that the defendant, its officers or agents or employees, permitted fire to escape from the engines of the defendant, and that it communicated to and consumed the property of the plaintiff, as alleged in the first count in the petition, they will find for the plaintiff on said count."

Instructions 5 and 6 asked by defendant and refused, also referred to below in the opinion of the court, were as follows:

5. "Before the jury can find for the plaintiff they must find that the fire was set by the carelessness and negligence of defendant, its agents or employees, and also that the plaintiff did not act that assisted in bringing about the act complained of, but that said injury was the sole act of defendant, caused by the carelessness and negligence of the defendant's agents or employees; otherwise the jury will find for the defendant on the first two counts of the plaintiff's petition."

6. "If the jury believe from the evidence that the plaintiff contributed in any way to the damage complained of, he can not recover from the defendant anything."

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Bedford v. Hannibal and St. Joseph Railroad Co.

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*McCandless & Henry*, for appellant.

I. The question of negligence is one of fact, to be submitted to the jury under all the circumstances in the case (*Kennedy v. North Mo. R.R. Co.*, 36 Mo. 351), and especially in such issues the appellate court will not disturb a verdict as against the evidence. (30 Mo. 262, 498; 15 Mo. 193; 29 Mo. 456; 28 Mo. 248, 593; 33 Mo. 260, 565; 36 Mo. 338; 37 Mo. 343.)

II. There was evidence sufficient to warrant the jury in finding negligence on the first two counts. (*Fitch v. Pacific R.R.*, 45 Mo. 522; 36 Mo. 338; 1 Redf. Railw. 454; 2 Ired. 138; *Hull v. Sacramento Valley R.R. Co.*, 14 Cal. 387; *Bass v. C. B. & Q. R.R. Co.*, 28 Ill. 9.)

III. The evidence satisfactorily showed that the damage complained of was caused by fire escaping from the engines on respondent's road, which alone, according to the English doctrine, makes a *prima facie* case of negligence; and the courts of this State should enforce this rule. (Gen. Stat. 1865, ch. 138, § 1, which adopts the common law of England; see also *Le Baun v. Le Baun*, 2 Am. Law Reg., N. S., 212.)

*Hall, Wright & Oliver*, for respondent.

BLISS, Judge, delivered the opinion of the court.

The petition contains three counts: one for setting fire to the grass by the side of defendant's railroad, by means of their running engine, and thereby burning several wheat-stacks belonging to plaintiff; one for setting fire in the same way, at another time, and burning his oats shocked in the field; and one for running over and killing his hog, their road not being fenced. The only controversy arises upon the first two counts. The case was submitted, under instructions, to a jury, who gave a verdict for the plaintiff upon each count, upon which judgment was rendered; and we have only to consider whether the instructions were correct. The plaintiff asked ten instructions upon these counts, of which four were given and the rest refused. The first instruction given is as follows:

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Bedford v. Hannibal and St. Joseph Railroad Co.

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2. "The defendant in this case was bound to a degree of care and diligence in proportion to the degree of damages and the probable extent of injury to the property of others in case of negligence; and if the jury believe from the evidence that the defendant, its agents or employees, failed to exercise that degree of care and caution they ought to have done under the circumstances, in consequence of which fire escaped from the engine of the train in their use, and communicated to and burned the property of the plaintiff, as alleged in the first count in his petition, then they will find for the plaintiff."

The second instruction given is the same applied to the second count.

The third instruction given requires caution and circumspection in the selection of mechanical contrivances and in watching and controlling the same, and if the agents, etc., of the company failed to use such caution, etc., and fire thereby escaped and burned plaintiff's property, the defendant is liable.

It is difficult to see what objection there could be to these instructions. I am not aware that anything contrary to them has ever been held by any court; but, on the other hand, the courts have gone much further and held that the fact that the fire is set by a railroad engine is *prima facie* evidence of negligence by those who run it or who provide the engine with its contrivances, and throws the burden of exonerating them upon the railroad company. The subject was considered in *Fitch v. The Pacific R.R. Co.*, 45 Mo. 322, where this doctrine was recognized.

The defendant asked for nine instructions, of which the court refused Nos. 1, 2, 5, 6; 8, and 9, and gave the rest. Nos. 1 and 8 assumed that no case had been made, and took it from the jury, which, under the evidence, the court had no right to do. Nos. 2 and 9 required proof of "actual negligence," which can not be inferred; while the court, in the fourth instruction given, had told the jury that in arriving at the fact of negligence or carelessness they must take into consideration all the circumstances of the case as detailed in the evidence. If the instructions refused meant the same thing as those already given, they were unnecessary, and it is no error to refuse them. But they

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Bedford v. Hannibal and St. Joseph Railroad Co.

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were rejected because they did not contain a full statement of the point, and were abundantly supplied by those already given at the instance of the plaintiff, and afterward by the court on its own motion. Nos. 5 and 6 contained a defective statement of the law of contributory negligence, and were properly refused. This subject, as applied to cases of this kind, was also considered in *Fitch v. Pacific R.R. Co.*, *supra*.

The court, upon its own motion, gave nine instructions, the first of which, taken alone, would have been erroneous, inasmuch as it seems to infer liability from the fact alone that fire escaped from the engines, and it is of this that counsel specially complain. But, in addition to what had been already held, the court, in its other instructions, and especially in Nos. 6, 7, and 9, expressly required that negligence should be affirmatively found, and went as far as seems to have been demanded by the language of the court in *Smith v. Hann. & St. Jo. R.R. Co.*, 37 Mo. 287, which rather over than under stated the requirement.

We see nothing in this record to warrant the interference of an appellate court, and the judgment of the District Court, reversing that of the Circuit Court, is reversed. The other judges concur.

[ END OF AUGUST TERM. ]

CASES  
ARGUED AND DETERMINED  
IN  
THE SUPREME COURT  
OF  
THE STATE OF MISSOURI,  
OCTOBER TERM, 1870, AT ST. LOUIS.

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ALFRED BUNDY, Respondent, *v.* WILLIAM HART, Appellant.

1. *Practice, civil — Actions — Slander. — Offense not being crime at common law, statute must be alleged, when.* — If an offense charged be a crime by the general law involving the punishment spoken of, the words are actionable without any allegation concerning the laws of the State or country where the offense is charged to have been committed; but it is otherwise where the act is not subject to criminal prosecution at common law, as in "barn-burning." Accordingly, in suit for slander brought in this State, an allegation in the petition that defendant said of plaintiff, "he had to leave Indiana for burning a barn," without the further averment that, by the law of Indiana, burning a barn could be arson, would be fatally defective.
2. *Practice, civil — Actions — Slander — Allegata and probata.* — In an action for slander, the words proved must be substantially the same words as those charged in the petition — not different words of the same import.

*Appeal from Fourth District Court.*

*Harrington & Cover, and Barrow & Millan, for appellant.*

I. The statute of Indiana, relating to the offense, should have been pleaded and proved like any other fact. If not pleaded, the court should not have permitted it to be read in evidence. (Townsh. Sland., § 159.)



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Bundy v. Hart.

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II. There is clearly a variance between the allegation in the petition and the proof. The weight and preponderance of the evidence shows that the words spoken were: "It is reported that he had to leave Indiana for burning a barn." These words do not support the allegation in the petition. The words proved are not equivalent to the words charged, nor are they the same in substance, nor is the same idea conveyed. (*Birch v. Benton*, 26 Mo. 153; *Coghill v. Chandler*, 33 Mo. 115; *Berry v. Dryden*, 7 Mo. 324.)

III. The petition does not state facts sufficient to constitute a cause of action. The words charged, to-wit: "he had to leave Indiana for burning a barn," are not actionable *per se*. Words, to be actionable *per se*, must of themselves impute the commission of an indictable offense for which corporal punishment may be inflicted as the immediate punishment, and not as a consequence of a failure to satisfy a pecuniary penalty. (*Birch v. Benton*, *supra*.) The statute of Indiana not being pleaded, the question as to whether the burning of a barn is arson will be governed by the common law. Courts can not take judicial notice of the statutes of Indiana, but will presume that their common law is the same as ours. (*Warren & Dalton v. Lusk*, 16 Mo. 102; *Houghtaling v. Ball*, 19 Mo. 84.) To burn a barn is not arson at common law. (*Townsh. Sland.*, § 337; *Barham v. Nethersol*, *Yelv.* 21.) At common law, arson is the willful and malicious burning of the house or outhouse of another man, and it must be the dwelling or some outhouse which is parcel thereof. (2 *Whart. Am. Cr. Law*, §§ 1658, 1667; *Townsh. Sland.*, § 166; 4 *Blackst.* 220.) A man may burn a barn and be justified in it. (*Ingalls v. Allen*, *Breese*, 300.)

IV. Either the words themselves must be such as can only be understood in a criminal sense, or it must be shown in a colloquium in the introductory part that they have that meaning, otherwise they are not actionable. (*Townsh. Sland.*, note 163; *Holt v. Scholefield*, 6 T. R. 691; *Harrison v. Stratton*, 4 *Espin. Cas.* 281; *Edgerly v. Swain*, 32 N. H. 478; *Chaddock v. Briggs*, 18 *Mass.* 248; *Bloss v. Tobey*, 2 *Pick.* 320; *Dorrey v. Whipps*, 8 *Gill*, 457; 13 U. S. *Dig.* 445, § 61; *Townsh.*, § 337; *Barham*

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Bundy v. Hart.

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v. Nethersol, *supra*; Gamsford v. Blatchford, 7 Price, 544; 6 Price, 36.) There is no allegation in the petition that, by the laws of Indiana, it is made arson to burn a barn.

*Porter, Williams & Eberman*, for respondent.

I. In Missouri, where the words were spoken, the burning of a barn, as charged in the petition, was arson. To the bystanders there the words imported the crime of arson. Then it was wholly immaterial whether the burning was arson in Indiana or not, since it was arson where the words were spoken. (*Russell v. Cornell*, 24 Wend. 356; *Case v. Buckley*, 15 Wend. 327.)

II. The testimony of appellant cures any defect there may have been in the petition by reason of its not averring that the burning of a barn in Indiana was there indictable; for such testimony shows that, from a letter which defendant claimed he had received from Indiana, plaintiff had been indicted for there burning a barn.

III. Although a petition may be defective, yet if it appear that the verdict could not have been given or the judgment rendered without proof of the matter omitted to be stated, the defect will be cured and the judgment will not be arrested. (*Richardson et al. v. Farmer et al.*, 36 Mo. 45, and authorities cited.

BLISS, Judge, delivered the opinion of the court.

The plaintiff prosecutes for slander, charging it as follows: "Plaintiff states that on or about the first day of December, 1866, defendant spoke the following false and slanderous words concerning the plaintiff: 'That he had to leave Indiana for burning a barn,' thereby meaning and intending to charge that plaintiff had been guilty of the crime of arson, and was so understood by the bystanders," etc. Defendant denied the speaking the words, and, upon the trial and by motion in arrest, claimed that the words were not actionable without the allegation that, by the laws of Indiana, burning a barn could be arson. That the words spoken, in order to be actionable in themselves, must import a crime involving disgraceful or corporal punishment, is not

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Bundy v. Hart.

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denied, and the elucidation of the law by Judge Richardson, in *Birch v. Benton*, 26 Mo. 163, leaves nothing to be said upon that point.

We can only assume that an act is criminal in another State or country where the court can not take notice of its laws, by proof of the fact, or by reference to the general or common law; and hence if the words charge an act to be done in another jurisdiction, which is not a crime by the common law, in order to make them actionable the petition should show and the evidence establish its criminality by the laws of such State or country. If the offense charged be a crime by the general law involving the punishment spoken of, as a charge of administering poison (33 Verm. 136), or of larceny (4 Blackf. 460), or murder (3 Wis. 709), the words are actionable without any allegations concerning the laws of the State or country where the offense is charged to have been committed. The court will assume that such offenses are universally punishable in a criminal court (*Johnson v. Dicken*, 25 Mo. 580); but it is otherwise where the act is not subject to criminal punishment at common law. Thus, it was held in *Barkley v. Thompson*, 2 Penn. 148, that a charge of adultery committed in New York is not actionable in Pennsylvania without showing it to have been punishable in New York as a crime; and all the authorities go to the same extent. (*Wall v. Haskins*, 5 Ired. 177; *Townsh. Sland.*, § 160, and cases cited.)

I find no difference in the authorities in regard to the necessity of proving the criminality of the act charged, but they are not equally clear upon the question of pleading. In *Shipp v. McCraw*, 3 Murphy, N. C., 463, the defendant had charged the plaintiff with stealing a note in Virginia; and it having been proved that the act was larceny by the laws of Virginia, the majority of the court sustained the judgment obtained by the plaintiff—Hall, J., dissenting upon the ground that the declaration had not set forth “whether or not the stealing of a note in that State was an offense.” But the question of pleadings was not noticed in the opinion of the majority, and they must either have ignored the fundamental principle of all pleading, that the material facts must be set out, or treated the declaration as sufficient after

verdict; for it is clear that, unless it was a crime in Virginia to steal a note, there was no slander, and that it was, was a fact to be alleged and proved.

The case of *Barham v. Nethersol*, 4 Coke, S. C., 20, and *Yelv. 22*, is often cited. No inducement was set out, and the words charged were: "T. Barham (the plaintiff) hath burnt my barn" (meaning my barn at that time full of corn). Judgment was arrested, because burning a barn was a trespass only, although it was a felony to burn it filled with corn. Had the extrinsic fact that the barn was full of corn been first alleged by way of "inducement," a foundation would have been laid in the pleading for inferring the meaning of the words; and it would have been good. The doctrine of this decision has been followed in all the leading cases, both in England and the United States, and this court has uniformly recognized it. (See *Townsh. Sland.*, §§ 159, 336-7, and cases cited in the notes; also *Palmer v. Hunter*, 8 Mo. 512; *Curry v. Collins*, 37 Mo. 324.) Indeed, I have never heard the general principle doubted, that where words are charged that are not actionable without a knowledge of some extrinsic fact, it is necessary to set forth that fact by way of preliminary averment. Unless it is done, the petition makes no case, and I can not see why the existence of the foreign statute necessary to give character to the words is not a fact merely, without which the words are legally innocent. The liability of defendant is a logical conclusion from the facts charged, and there is no liability on paper if a material fact is omitted to be charged.

And it is not sufficient that the extrinsic facts appear by the innuendo, for it is not the office of the innuendo to make averments, but to apply the words or explain their meaning. (*Van Vechten v. Hopkins*, 5 Johns. 211.) Averments must be proved. Innuendos are used to so connect the words charged with the averments, or show their meaning, as to make the petition a logical and complete statement of the plaintiff's case. "The question which an innuendo raises is in all cases a question not of fact, but of logic." (*Fry v. Bennett*, 5 Sandf., N. Y., 65.)

The code dispenses with all special averments showing the application to the plaintiff of the defamatory matter, but with no

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Bundy v. Hart.

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other, and, with this exception, all the rules applicable to the substance of the petition are in full force. (*Fry v. Bennett, supra.*)

Applying these principles to the case at bar, it will be seen that the petition is defective in not showing that burning a barn, without the circumstances that make it arson at common law, is made arson by the laws of Indiana. It is not an offense at common law unless the barn was connected with a dwelling-house or was filled with corn. (4 Blackst. 221.) The pleader attempts to supply the want of a proper averment by an innuendo, which can not be done. Its province, as we have seen, is to explain the meaning of the words, and the meaning ascribed to them can not be true unless the act charged was arson by the laws of Indiana, of which we are unadvised. Had the words been "he had to leave Indiana for burning a dwelling-house"—meaning that he there feloniously burned a dwelling-house of another, or meaning that he was there guilty of arson—no extrinsic averment would have been necessary; for the words themselves, if the true meaning were given, would be actionable as charging a crime *per se*.

It may be said that the courts of each State should assume all acts to be criminal in other States that are made so by the statutes of their own State, but this would be an assumption not only contrary to the traditions and practice of courts, but contrary also to the known fact; and if it be also said that burning a barn is a crime of such moral turpitude that we should assume it to be a punishable offense, that must depend upon circumstances. If the charge involve such a burning as to make it by our statute arson in the first or second degree, the remark would apply, for that would be a crime at common law, and no foreign statute need be alleged or proved. But many of our western barns are in the open field and of trifling value, some being built of poles and straw, and their destruction would involve less of the moral elements of crime than some mere trespasses. No such aggravated meaning was sought to be given to the words charged in the petition, and the plaintiff relied entirely upon the Indiana statute, which he was permitted to prove without having pleaded it.

The suggestion of counsel that the petition is good after ver-  
30—VOL. XLVI.



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Bundy v. Hart.

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dict is not valid, for the reason, if there were no other, that defendant objected to it in every stage of the case and excepted to the action of the court in sustaining it.

The court also committed error in refusing to give the following instruction to the jury: "The court instructs the jury that if they believe from the evidence that defendant did not speak the words charged, to-wit: 'He (Bundy) had to leave Indiana for burning a barn,' but that he spoke the following other words, to-wit: 'I think my character is about as good as Bundy's; I hadn't to leave Indiana for burning a barn,' these words will not support the charge, and they will find for defendant." This instruction should have been given, for the words supposed do not support the petition. The words proved must be substantially the same words charged in the petition, not different words of the same import. More words may be and usually are proved than are laid, but those laid must be substantially covered by the proof. The law upon this subject is well stated by Judge Scott in *Berry v. Dryden*, 7 Mo. 324, and is affirmed and enlarged upon in *Birch v. Benton*, *supra*. "Although the words proved," says Judge S., "are equivalent to the words charged in the declaration, yet, not being the same in substance, an action can not be maintained; and although the same idea is conveyed in the words charged and those proved, yet if they are not substantially the same words, though they contain the same charge, but in different phraseology, the plaintiff is not entitled to recover." Proof of words spoken in the second person will not sustain a petition charging the speaking to have been in the third person. (*McConnell v. McCoy*, 7 Serg. & R. 223.) In an old case the words "she is as very a thief as any that robbeth," etc., were held not to be supported by proof of the words "she is a worse thief than any that robbeth," etc. (*Ratcliff v. Shubley*, Cro. Eliz. 224.) The whole subject of variance between words laid and proved is discussed in *Starkie on Slander*, etc., pp. 369-76, and differences much slighter than between those in the petition and supposed in the instruction refused are held to be fatal.

The judgment is reversed and the cause remanded. The other judges concur.

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 Carson v. Hunter.
 

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**JAMES A. CARSON, Defendant in Error, v. W. A. HUNTER,**  
**Plaintiff in Error.**

1. *Contracts*—*Lex fori* governs questions affecting the remedy.—The *lex fori* decides all questions which pertain to the remedy only, and not to the contract.
2. *Limitation*—*Acts of, not expressly discharging debt, go to remedy merely.*—Acts of limitation, unless they expressly discharge a debt, go to the remedy merely, and none can be pleaded except those in force where the suit is brought.
3. *Limitations, statute of*—*Removal from one State to another*—*Revival of contract.*—A debt barred by the statute of one State, but not by that of another, may be revived by the removal of the debtor from the former to the latter, between the periods of limitation; and an act which provides that suit on a given class of contracts shall be brought within a certain period, "and not after," does not extinguish the contract after that period, so as to prevent such a revival.
4. *Bills and notes*—*Proclamation of August, 1861*—*Note given for slaves taken to States in insurrection, without consideration.*—A note given for the purchase of negroes taken into the States in insurrection, without special license, during the late war, and after the proclamation of the President, of August 16, 1861, had no legal consideration and could not be collected.

*Error to Second District Court.*

*Van Alen & Reece*, for plaintiff in error.

I. The statute (Rev. Stat. Arkansas, 527) works a discharge of the note everywhere. Whatever constitutes a good defense by the law of the place where the contract is made or is to be performed, is equally good in every other place where the question may be litigated. (2 Kent's Com. 574, 7th ed.; Goodman v. Monks, 8 Post, Ala., 84; Gordon v. Preston, Wright, Ohio, 341; Horton v. Hosmer, 16 Ohio, 145; Davis v. Minor, 1 How., Miss., 183; Baker v. Stonebreaker, 36 Mo. 338; Stephens v. St. Louis National Bank, 43 Mo. 335; Const. U. S., art. iv, § 1.) The statute of Arkansas differs from that of Missouri and most of the other States in this: that it bars all remedy after five years; *i. e.*, actions shall be brought within five years, "and not after." All the remedy being barred by the *lex loci contractus*, there is a virtual extinction of the right in Arkansas, which ought to be recognized in every other tribunal as of equal validity. (*Le Roy v. Crowninshield*, 2 Mason's C. C. 151; Goodman v. Monks, *supra*, and cases cited.)

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Carson v. Hunter.

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II. The facts set up in the answer show most clearly a contract founded upon a breach of law, contrary to public policy, and there was, therefore, no valid consideration for the note in suit. (*Griswold v. Waddington*, 16 Johns. 486; *Peltz v. Long*, 40 Mo. 532.)

*Perryman & Dinning*, for defendant in error.

I. The statute of limitations of Arkansas simply affects the remedy, and does not extinguish the debt. (*Baker v. Stonebreaker*, 36 Mo. 338; *Nash v. Tupper*, 1 Cains, N. Y., 402; *Ruggles v. Keeler*, 3 Johns. Ch., N.Y., 263; *Sto. Conf. Laws*, 935, § 556; *McElmoyle v. Cohen*, 13 Pet. 312; 2 Kent, 11th ed., 599-601; *Carpenter v. Wells*, 21 Barb., N. Y., 593; *Wood et al. v. Watkins et al.*, 17 Conn. 500; *Broadhead v. Noyes*, 9 Mo. 55; *Dorsey v. Hardesty*, *id.* 157; *Minor v. Cardwell*, 37 Mo. 350; *Labadie v. Chouteau*, *id.* 413; *Deconche v. Savetier*, 3 Johns. Ch. N. Y., 217; 4 Cow. 528, note and cases there cited.)

II. The answer of defendant did not disclose any legal defense to plaintiff's cause of action. The consideration for the note was good. (*Phillips v. Evans*, 38 Mo. 305.) Under the law of Missouri, the consideration for the note is good, and this court will presume the laws of Arkansas to be the same as ours. (*Milly v. Smith*, 2 Mo. 36; *Charlotte v. Chouteau*, 25 Mo. 465.).

BLISS, Judge, delivered the opinion of the court.

The plaintiff brought his action upon a promissory note given him by defendant at Pocahontas, Arkansas, November 12, 1861, to which the maker sets up two defenses: first, the statute of limitations of Arkansas; second, illegality of consideration.

This suit was brought in Missouri, and we have nothing to do with the Arkansas act of limitation. The *lex fori* decides all questions pertaining to the remedy, and the statute given in evidence does not vary substantially from our own, except that the time is fixed at five instead of ten years. It is too well settled now to admit of question, that acts of limitation, unless they expressly discharge the debt, go to the remedy merely, and that

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Carson v. Hunter.

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none can be pleaded except those in force where the suit is brought. (King v. Lane, 7 Mo. 241; Sto. Confl. Laws, § 577 *et seq.*, and all the authorities.)

It is claimed, and not without show of reason, that where, as in the case at bar, the term fixed by the statute had already expired before the pleader left the State in which the contract was made, it should be deemed to have been discharged, and that it can not be revived by removal to another State. Judge Story considers this point at length in *Le Roy v. Crowninshield*, 2 Mason, 151, and thinks the position founded in reason, although in deference to authority he decides against it. In *Bulger v. Roach*, 11 Pick. 36, the question came before the Supreme Court of Massachusetts, and the court denied the force of the distinction involved in it, and held that the general doctrine applied to "a case where both parties were subject to the jurisdiction of a foreign State, when the bar arising from its statutes of limitation attached." Justice Shaw gives as a reason for making no distinction between cases where the statutory period had elapsed when the party left the foreign jurisdiction, and where it was still running, the fact that the time having begun to run would continue until completed, notwithstanding the parties might leave the jurisdiction. This is a good reason, though somewhat technical; but a better one, it seems to me, is suggested by the policy that dictates, and by the character of, acts of limitation. They are properly called statutes of repose. The State fulfills its duty to the citizen if a reasonable time is given to apply for the redress of wrongs. More than that encourages strife, by reviving controversies that had been suffered to sleep, and reviving them, too, after it may have become difficult to understand their true character. Each State must necessarily decide for itself what time is reasonable.

It is sometimes said that these acts raise an imperative presumption of payment or satisfaction; and if this were their theory, and if this presumption once attached, I do not see how it could be avoided by a change of domicile; and besides, it would seem in such case that the limitation could be shown in support of a plea of payment, etc. But when we consider these acts as

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Carson v. Hunter.

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declarations of the law-making power, fixing the period of time in which courts shall be open for the redress of grievances, it seems perfectly clear that the term prescribed by one State has no control whatever over that which may be fixed by another. If the State of Arkansas says that it will furnish and support tribunals to litigate claims growing out of bills and notes, five years and no more after the cause of action has accrued, it is no reason why Missouri may not determine upon a longer or shorter period. These acts of limitation do not assume that in a certain period liabilities will have been satisfied in fact, but they fix a reasonable period in which the law will aid parties in enforcing satisfaction; and if Missouri grants a longer time than Arkansas, it does not thereby revive a satisfied claim, but simply gives claimants greater opportunities to compel a debtor to do what he should have done without compulsion. This theory in regard to limitations to actions upon contracts was adopted by this court in *Stephens v. The St. Louis National Bank*, 43 Mo. 385, and effectually repels the idea that payment is to be presumed from the lapse of the period provided in the Arkansas statutes.

We are referred by counsel to *Baker v. Stonebreaker*, 36 Mo. 338, in which a certain act in force in Maryland was held not to be a mere act of limitation, but that it absolutely extinguished the cause of action. "The doctrine is well established," says the court, "that when an act of this kind operated to extinguish the contract or debt itself, the case no longer falls within the law of limitations on the remedy merely. In such case, when the debt or judgment is sued on in another State, the *lex loci contractus*, and not the *lex fori*, is to govern." But the limitation pleaded in the case at bar is not an abrogation or extinguishment of the contract. It provides that suits shall be brought within a certain period, "and not after"—the latter phrase not varying, though making a little more emphatic, the general provision.

The second defense sets out, though imperfectly, an insufficient consideration, inasmuch as the note was given for slaves taken by the plaintiff from Missouri to Arkansas during the war, and sold to defendant. Congress, by the act of July 13, 1861,



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Carson v. Hunter.

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authorized the president to declare any State or part thereof to be in a state of insurrection, and forbade all commercial intercourse between the same and their citizens and the citizens of the rest of the United States. Under this act the president of the United States, on the 16th of August, 1861, declared certain States, including Arkansas, to be in insurrection, and from that period all trade between citizens of Missouri and those of Arkansas became unlawful unless by special license. If the plaintiff, after that time, took negroes, or anything else which was the subject of barter and sale, into Arkansas and sold them, and received the note now in suit in payment, the transaction was in violation of law, and the note can not be collected.

The Supreme Court of the United States, in *The Ouachita Cotton*, 6 Wall. 521, considered the effect of this act and proclamation, and pronounced the various purchases then under consideration, and made in contravention of them, to have been unlawful, and operating no transfer of property; and in *The Reform*, 3 Wall. 632, and *The Sea Lion*, 5 Wall. 647, special license from the president was held essential to validate such trade.

This disability would necessarily spring from the fact of war, for the absolute prohibition of commercial intercourse between subjects of belligerent States, without license from the sovereign power, is one of its incidents. Says Kent, in *Griswold v. Waddington*, 1 Johns. 483: "The law has put the sting of disability into every kind of voluntary communication and contact with an enemy, which is made without the special permission of the government." Wheaton, in his *Elements of International Law*, on pages 391-92, considers the subject at some length, and by various citations from English and continental as well as American authorities, shows the rule prohibiting commercial intercourse without license, between citizens or subjects of hostile States, to be universal and inflexible. Applying it to contracts, in section 15, p. 392, he says: "It follows, as a corollary from the principle interdicting all commercial and other pacific intercourse with the public enemy, that every species of private contract made with his subjects during the war is unlawful. The rule

this declared is applicable to insurance on an enemy's property and trade; to the drawing and negotiating of bills of exchange between the subjects of the powers at war; to the remission of funds in money or bills to the enemy's country," etc.

During the late civil war many slaves were taken to the States in insurrection, and their whole labor became thereby directed to the creation of such supplies as alone could enable the enemy to keep the field. To hold such intercourse lawful, and enforce contracts made in prosecuting it, would suppose that government could sanction its own destruction, and would present the spectacle of a country lawfully fighting those whom its subjects were lawfully feeding. The law tolerates no such absurdity.

The record shows that the Circuit Court must have held that the note in suit was barred by the Arkansas statute of limitations, and for that reason the District Court did right in reversing its judgment. It does not appear that the facts involved in the other defense were passed upon, and until that was done, the District Court should not have rendered judgment upon the demand. Its judgment of reversal is affirmed, but that rendered upon the note is reversed and the cause remanded to the Circuit Court for a new trial, with leave to amend the answer. The other judges concur.

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A. W. BISHOP, Defendant in Error, v. JULIUS F. SCHNEIDER  
*et al.*, Plaintiffs in Error.

1. *Deed properly recorded imparts notice, although not indexed.*—A deed properly filed and copied of the record, is recorded within the meaning of the law (R. C. 1855, p. 1314, §§ 13, 14; Wagn. Stat. 1141, §§ 12, 13), and imparts notice to subsequent purchasers, notwithstanding the failure of the officer to index it. The index is no part of the record.

The recorder is liable to the party aggrieved for double the amount of damages sustained by reason of the failure of the officer to index the deed. But *semble*, that it must appear that his damage arose from such neglect of the recorder, not from other causes, such as, *e. g.*, his own reliance upon false outside representations as to title without an examination of the index, or from his mistaken reliance upon the covenants of his grantor, independent of the matter of notice.

## Bishop v. Schneider et al.

2. *Deed improperly acknowledged imparts no notice.*—Where it is provided by the statute that, in order to the registration of a conveyance, it shall be acknowledged before some officer, and a certificate thereof entered upon the deed, if the same be recorded without the prescribed acknowledgment, the recording will not be constructive notice to any one.
3. *Justice of the peace in one county can not certify acknowledgment of deed conveying land in another county.*—A justice of the peace in one county has no authority to take and certify the acknowledgment of an instrument conveying lands in another county. (R. C. 1855, p. 358, § 17, p. 365, §§ 40-1; Wagn. Stat. 274, § 9, p. 277, §§ 24-5.) Such an acknowledgment is a nullity, and the deed, although recorded, imparts no notice.
4. *Conveyances—Defective acknowledgments—Act of 1855 touching, does not cure subjective acknowledgments.*—The statute concerning evidence (R. C. 1855, p. 731, § 46; Wagn. Stat. 595, § 35), providing that conveyances made theretofore, and unacknowledged, or defectively acknowledged, should impart notice, was intended to apply exclusively and solely to conveyances made prior to the taking effect of the code of 1855. That statute derives no additional force or power from being found in the statutes of 1865. Its republication must be construed as a continuation of the old law, and not as a new enactment. (Wagn. Stat. 897, § 5.) Hence, when a defectively acknowledged mortgage was made after the adoption of the Revised Code of 1855, it does not come within the saving clause of that enactment, and imparted no notice.
5. *Conveyances—Defective acknowledgments can only be taken advantage of by a purchaser for value.*—A defective acknowledgment can only be taken advantage of by a purchaser for a valuable consideration. In all cases the purchaser must show that he paid the purchase money before he is entitled to relief on account of not having any notice.

*Error to Second District Court.**H. F. Ahlvers, for plaintiffs in error*

I. The land lying in Jefferson county, and the mortgage seeming to have been acknowledged before a justice of the peace of Franklin county, the same was not acknowledged according to law, was therefore not entitled to be recorded, and hence could not be read as a recorded deed against Schneider. (Meyer v. Wiltberger, 2 Ga. 20; Schulz v. Moore, 1 McLean, 520; Heister v. Fortner, 2 Binn. 40; Smith v. Mounts, 1 Mo. 714.)

II. Even if the mortgage had been duly and properly acknowledged as proven, it could still not be read in evidence as a recorded deed, as it was not indexed, and therefore was not recorded as the law requires. The indexing is a part of the record, and absolutely necessary to convey notice to subsequent purchasers. (Gen.

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Bishop v. Schneider et al.

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Stat. 1865, p. 160, § 14.) In this case the recorder was guilty of neglect in not indexing the mortgage, and he would be responsible in an action to the mortgagee in said mortgage who filed the deed for record, but not to Schneider, as he is no party to the mortgage. As to whom the recorder is liable to for neglect, and as to the effect of not indexing deeds, see *Barry v. McCarty*, 11 Iowa, 510; *Noyes v. Howe*, 12 Iowa, 570; 44 Mo. 309; *Sawyer v. Adams*, 8 Verm. 172.

*Thomas & Thomas*, for defendant in error.

I. The mortgage imparted notice of its contents to subsequent purchasers and mortgagees. (R. C. 1855, p. 731, § 46, copied into Gen. Stat. 1865; *Lemay v. Poupenez*, 35 Mo. 76.)

II. The deed, although not indexed, imparts notice to subsequent purchasers and mortgagees. (R. C. 1855, p. 731, § 46.) The holder of the deed is not bound to examine the books of the recorder to ascertain whether his deed has been properly indexed. If he is bound to see that it is indexed, then no deed could safely be sent and returned by mail. Schneider's remedy is — if he has been injured, which does not appear from the record in this case — to proceed against the recorder on his official bond. The record in this case does not show the appellant to be entitled to the relief he demands. The answer of Schneider does not allege that he paid anything for the title he got, nor does the evidence prove it. (See *Halsa v. Halsa*, 8 Mo. 313, and cases cited.)

WAGNER, Judge, delivered the opinion of the court.

In this case the record shows that one Reynolds, on the 2d day of January, 1860, executed to Robert E. Warren his promissory note for \$852.90, and that, subsequently, to secure the payment of the same, he made and delivered to Warren a mortgage on certain real estate lying in Jefferson county. The mortgage was duly filed for record in the recorder's office of Jefferson county, and recorded, but no index thereof was made. On the 1st of May, 1869, Warren assigned the note and mortgage to Bishop, the plaintiff in this suit.

Reynolds, by deed dated March 17, 1864, and properly recorded, conveyed what interest he possessed in the land to one Ackerman, and Ackerman conveyed the same by deed of trust to secure a certain indebtedness. The trustee, in pursuance of the trust, advertised and sold the land on the 14th day of December, 1867, and Schneider, the defendant, became the purchaser. It is not shown that Schneider had any other notice of the mortgage encumbrance than what was imparted by the record.

The mortgage was defectively acknowledged, and on this proceeding being instituted for foreclosure, the suit was resisted mainly on two grounds: first, that the record imparted no notice of the contents of the mortgage; secondly, that the instrument was not recorded within the meaning of the statute.

The Circuit Court overruled the objections of the defendant and gave judgment for the plaintiff. This judgment was affirmed in the District Court, and the defendant has sued out his writ of error and brought the cause here for review.

I will first examine the point in reference to the effect of the failure of the clerk to properly index the mortgage. It is contended that, because the mortgage was not indexed by the recorder, it was not recorded according to law, and therefore failed to give even constructive notice to a subsequent purchaser. This necessarily raises the question whether the index is a part of the record, and whether, when the officer has failed to comply with his duty in this regard, although the grantee has done everything that was required of him by law, the recording shall be deemed a nullity and of no avail. In the case here the mortgage was duly filed and regularly recorded, and a certificate indorsed on the instrument stating that fact. The grantee then relied on the assurance that the recorder had discharged his whole duty, and that he would be protected in his rights. But, by the neglect and carelessness of that officer, no index to the deed was made, as the statute directs, and hence persons searching the records would be apt to be misled as to any existing encumbrance. Upon whom the primary loss must fall in such a case depends upon the construction of the statute in reference to the registration of conveyances.



All these proceedings were had whilst the statutes of 1855 were in force, though the same provisions are to be found in the subsequent revision of 1865.

By section 13, p. 1314, R. C. 1855, it is provided that the recorder shall record, without delay, every deed, mortgage, conveyance, deed of trust, bond, commission, or other writing delivered to him for record, with the acknowledgments, proofs, and certificates written on or under the same, with the plats, surveys, schedules, and other papers therein referred to and thereto annexed, in order of time, when the same shall have been delivered for record, by writing them, word for word, in a fair hand, noting at the foot of such records all interlineations and erasures and words visibly written on erasures, and noting at the foot of the record the day of the month and year when the instrument so recorded was delivered to him or brought to his office for record; and the same shall be considered as recorded from the time it was so delivered.

It is provided by section 14 that the recorder shall certify, on or under such deed, mortgage, conveyance, deed of trust, bond, commission, or other instrument so recorded, the day, month, and year when he received it, and the book and page or pages of the book in which it is recorded; and, when recorded, deliver it to the party or his order.

Section 15 declares that the recorder shall keep in his office a well-bound book, and make and enter therein an index, direct and inverted, to all the books of record wherein deeds, mortgages, or other writing, concerning real estate or deeds of trust, are recorded, distinguishing the books and pages in which every such deed or writing is recorded.

Section 16 prescribes that the index shall contain, in alphabetical order, the names of the several grantors and grantees, etc. Sections 17 and 18, in like manner, require that the clerk shall provide books for indexing marriage contracts and commissions and office bonds. Section 19 imposes a penalty on the recorder for refusing or neglecting to perform his duty, and further says that if he neglects or refuses to provide and keep in his office such an index as is required by the act, he shall pay to the party

aggrieved double the damages which may be occasioned thereby, to be recovered by civil action on the official bond of the recorder. The grantee has no control over the official acts of the recorder, and when he has delivered to the officer his deed, he has performed all the duty within his power; and when the deed is copied on the record, the statute says it shall be considered as recorded from the time it was delivered. The subsequent sections are distinct and independent provisions respecting indexing, and do not form a part of the law as to recording. They impose a duty on the officer, and denounce a liability for a neglect or refusal to obey that duty, but they do not make what has previously been done void.

In the case of *Terrell et al. v. Andrew County*, 44 Mo. 309, the mortgage was given for four hundred dollars, and the recorder, in recording the same, by mistake inserted two hundred dollars in the record instead of four hundred dollars, showing an encumbrance for the former instead of for the latter sum; and it was decided that notice of the contents of instruments was imparted after filing only where they were correctly spread upon the record, and not otherwise. And in conformity with that view the subsequent purchaser had notice of a subsisting encumbrance for two hundred dollars, and no more.

So, in *Beckman v. Frost*, 18 Johns. 544, the registry of a mortgage of \$3,000 as a mortgage of \$300 was considered as notice only of an encumbrance for the sum stated in the record. In such cases the purchaser may be wholly free from fault or negligence. He may deliver his deed to the proper officer, and it may be returned to him as recorded, but, through accident or design, it is not truly recorded. Subsequent purchasers or creditors, having no other means of knowing of the contents of the deed than by resorting to the records, can not be considered as having notice of any other conveyance than such as appeared on the record.

Where a town clerk copied a deed delivered to him for record on a book which had ceased to be a book for recording for a number of years, and, for the purpose of concealment and fraud, did not insert the names in the index or alphabet, it was held that

the deed was not recorded, and was no notice to after-purchasers. (Sawyer v. Adams, 8 Verm. 172.)

In the case just mentioned, the mortgage, which was made by the clerk as grantor, was copied on the back leaf of a volume of records in which there had been no deeds recorded for upwards of twelve years, and a number of new books had been used for the purpose of recording. It was a plain and palpable fraud, as the book was not at that time a book used for recording.

Under a statute essentially similar to ours in all its provisions and regulations, it was held that where the mortgagee left his mortgage with the clerk for record, and the clerk recorded the same at length, and so certified upon the mortgage, but made no index of the said mortgage, that the mortgage was properly recorded within the meaning of the statute, and that the index constituted no part of the record, and that the mortgage became an encumbrance upon the land from the time it was transcribed upon the record. (Curtis v. Lyman, 24 Verm. 338.)

The result of the doctrine insisted upon by the counsel for the plaintiff in error is to superadd or provide an additional requisite to the record of conveyances; in other words, no record is to be considered of any validity till an index is duly made out and entered. But no such language is, however, found in the statute, nor do we think any intention to ingraft such additional requisite upon a deed can be fairly implied from the language used.

The general nature, object and scope of the whole act, taken together, is to point out the duty of the clerk not only in the making of a proper record of conveyances, but also in furnishing facilities for their discovery, examination, and use, by all persons interested in them; and to secure the due performance of these duties the clerk is made liable to the party injured for the neglect of them. The index, which it is the duty of the clerk to make out and preserve in a book for that purpose, seems to be one of the facilities to be used in making search for the record, but not a part of the record itself.

It is his duty to have an index and to enter upon it a proper reference to every record of a conveyance, and for any neglect to do so he is liable to the party aggrieved for double the amount of

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Bishop v. Schneider et al.

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damages sustained. But it is not certain that any one will be injured by the neglect, and therefore the record itself should not be held void. The purchaser may take his deed, relying solely upon the representations or covenants of his grantor, without desiring to examine the records. An index or the want of it would obviously be of no importance to him. So if, without making any search, or causing any to be made, a person should rely alone upon the representations of the clerk that the title was clear, and these representations should be knowingly false, could it with reasonable propriety and fairness be said that he was injured by want of an index? Yet in these cases, if the argument advanced be correct, though no one is injured by the failure of the clerk to perform his duty as to indexing, and though the purchaser has had his deed correctly transcribed and spread upon the record, still the recording should be held void.

In my opinion, the proper office of the index is what its name imports—to point to the record—but that it forms and constitutes no part of the record. The statute states, without reserve or qualification, that when an instrument is filed with the recorder and transcribed on the record, it shall be considered as recorded from the time it was delivered. From that time forth it is constructive notice of what was actually copied. A subsequent section, for the purpose of facilitating research, besides recording, devolves a separate, distinct, and independent duty upon the recorder, and in the event of non-compliance with that duty the party injured has his redress. The purchaser or grantee, when he has delivered his deed, and seen that it was correctly copied, has done all the law requires of him for his protection; and if any other person is injured by the fault of the recorder in not making the proper index, he must pursue his remedy against that officer for the injury.

Assuming, then, that the recording of the mortgage was good under the law, the next inquiry is whether it was such an instrument as would impart constructive notice by registration. It purported to convey certain lands lying in Jefferson county, and the acknowledgment was taken before a justice of the peace in Franklin county. The statute (R. C. 1855, p. 358, § 17) pro-

vides that the proof or acknowledgment of every conveyance or instrument in writing, affecting any real estate in law or equity, shall be taken by some one of the following courts or officers: first, if acknowledged or proved within this State, by some court having a seal, or some judge, justice, or clerk thereof, notary public, or some justice of the peace of the county in which the real estate conveyed or affected is situated, etc.

Section 40 of the same act, relating to conveyances, declares that every instrument in writing that conveys any real estate, or whereby any real estate may be affected in law or in equity, proved or acknowledged and certified in the manner before prescribed, shall be recorded in the office of the recorder of the county in which such real estate is situated. And section 41 provides that every such instrument in writing, certified and recorded in the manner before prescribed, shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof; and all subsequent purchasers and mortgagees shall be deemed, in law and equity, to purchase with notice.

Where it is provided by the statute that in order to the registration or recording of a conveyance, the deed shall be acknowledged before some officer, and a certificate thereof entered upon the deed, if the deed is recorded without the prescribed acknowledgment, the recording or registration will not be constructive notice to any one. (*Work v. Harper*, 24 Miss. 517; *White v. Denman*, 1 Ohio St. 110; *Blood v. Blood*, 23 Pick. 80; 2 Washb. Real Prop., 3d ed., 139.) In the present case the justice in Franklin county had no authority to take and certify the acknowledgment of an instrument conveying lands in Jefferson county, and the acknowledgment, therefore, was a nullity, and the mortgage, although recorded, imparted no constructive notice.

But it is contended here, and the court below seem to have taken the same view, that our statute concerning evidence has cured the defect so as to make the record give the requisite notice. In support of this position that section is quoted which provides as follows: "The records heretofore made by the recorder of the proper county, by copying from any deed of



conveyance, deed of trust, mortgage, will, or copy of a will or other instrument of writing, that has neither been proven nor acknowledged, or which has been proven or acknowledged, but not according to the law in force at the time the same was done, shall, from and after the passage of this act, impart notice to all persons of the contents of such instruments, and all subsequent purchasers and mortgagees shall be deemed to purchase with notice thereof." (R. C. 1855, p. 731, § 46; Wagn. Stat. 595, § 35.)

This section was first passed in 1847, thence inserted in the revision of 1855, and continued in the statutes of 1865. If it has the effect ascribed to it, it in a great measure nullifies and renders nugatory the law on this subject of conveyances, so far as acknowledgment, certifying, and recording are concerned. If the deed imparts notice without being acknowledged, or not acknowledged or proved according to law, then every instrument which the recorder may place upon the record is sufficient, although it is wholly wanting in the absolute requirements of the statute. It is hardly to be supposed that the Legislature intended by this section to repeal, nullify, and render nugatory the whole law in reference to the essential elements of acknowledgments and recording. But when we look at the history of the enactment, its scope and tenor, we find clearly that no such intention prevailed. The section was embodied originally in the somewhat famous limitation act, and was approved February 2, 1847. The act is entitled "an act to quiet vexatious land litigations," and was designed, in connection with the period of limitation, which was therein inserted, to put a speedy termination to controversies arising out of defects in conveyances which were made anterior to that period, and which were often informally executed. The section was imported and re-enacted literally in the statutes of 1855, and thence continued in the revision of 1865.

Full force and effect was given to the section in the case of *Allen v. Moss*, 27 Mo. 354; but that was a case where the deed had been executed, acknowledged, and recorded prior to the taking effect of the code of 1855. The word "heretofore" is the controlling one in the section, and shows that the act was

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Bishop v. Schneider et al.

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intended to apply exclusively and solely to prior conveyances. The provision, then, applies to all conveyances made previous to the taking effect of the statutes of 1855, and no further. It derives no additional force or power from being found in the statutes of 1865, for it is the same identical section that existed in the former statutes; and where that is the case, the General Statutes enact that the provisions of the General Statutes, so far as they are the same as those of existing laws, shall be construed as a continuation of such laws, and not as new enactments. (Wagn. Stat. 897, § 5.)

For these reasons, as the mortgage was made and acknowledged subsequent to the adoption of the statute of 1855, I am of the opinion that it did not come within the provisions of the saving clause of the section, and that the court erred in its rulings as to this point.

One question remains to be disposed of. Schneider, in his answer, states that he purchased the property at trustees' sale; but there is no averment that he paid any valuable consideration for it, or that he has parted with anything in consequence of the purchase; nor is there any evidence in the record showing that fact. The very point was decided in *Chouteau v. Burlando*, 20 Mo. 482, and it was there held that a defective acknowledgment could only be taken advantage of by a purchaser for a valuable consideration. In all cases the purchaser must show that he paid the purchase money before he is entitled to relief on account of not having notice. (See *Halsa v. Halsa*, 8 Mo. 303; *Paul v. Fulton*, 25 Mo. 156; *Chouteau v. Burlando*, *supra*; *Aubuchon et al. v. Bender et al.*, 44 Mo. 560; *Jewett v. Palmer*, 7 Johns. Ch. 65; *Wormley v. Wormley*, 8 Wheat. 421.)

Although the ruling of the court as to the mortgage imparting notice was erroneous, yet we can not see that the defendant was injured thereby, as by his own pleadings he does not stand in an attitude entitling him to relief.

Judgment affirmed. The other judges concur.

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Ryan v. Carr.

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EDMUND RYAN, Plaintiff in Error, v. MUNSON CARR, Defendant  
in Error.

1. *Conveyances — Act December 12, 1855 — Defective acknowledgments subsequent to, impart notice.*—A private deed, although defectively acknowledged, or even not acknowledged at all, is good between the parties and against subsequent purchasers with notice; and under our statute (Wagn. Stat. 595, §§ 35, 36), the record of such a deed prior to December 12, 1855, would impart constructive notice. (Stevens v. Hampton, *ante*, p. 404; Bishop v. Schneider, *ante*, p. 472.) But a sheriff's deed under an execution sale, if defectively acknowledged, conveys no title. The property is conveyed against his will. The conveyance is not his act, but that of the law, and the law must be strictly complied with.

And such deeds are not validated by sections 35 and 36, *supra*. The sole object of these sections was to cure defective acknowledgments of conveyances in themselves good. And they can not apply to a sheriff's deed, for the reason that a legal acknowledgment is essential to the validity of the deed itself.

*Error to Second District Court.*

*Ewing & Holliday, and Conger, Reynolds & Relfe*, for plaintiff in error.

I. The deputy sheriff had full authority to make the deed (Ter. Laws, § 10, Geyer's Dig.); and even if no express authority were given by law, yet the making up of the deed was a ministerial act, and could be performed by a deputy. (Lewis v. Lewis, 9 Mo. 188.)

II. The defect, if any, in the certificate is cured by section 36, chapter 143, p. 595, Wagn. Stat., which is but a recognition of the old doctrine, that an ancient document proves itself, extended to cases in which the original instrument is lost, so as to include the record thereof. (1. Greenl. Ev., §§ 20, 21.)

*Detchemendy & Emerson*, for defendant in error, urged among others the following points:

I. A sheriff's conveyance must strictly comply with all the requirements of the statute, otherwise it is void. (Morton v. Reed, 9 Mo. 878; Williams v. Payton, 4 Wheat. 77; Parker v. Rule's Lessee, 9 Cranch, 64.)

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Ryan v. Carr.

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II. The so-called sheriff's deed was not the act of the then sheriff, Daniel Dunklin, and is therefore void, as the law then in force required the sheriff, and not a deputy, to make and acknowledge deeds for land sold under execution. (1 Ter. Laws, 120, § 45; Geyer's Dig. 269, §§ 72-4; Evans v. Ashley, 8 Mo. 177; Alexander & Betts v. Merry, 9 Mo. 514.)

BLISS, Judge, delivered the opinion of the court.

In 1820, the person from whom the plaintiff claims title to the land in controversy purchased the same at sheriff's sale. Before the levy and sale, but while the judgment lien existed, the judgment debtor conveyed the land to the person from whom the defendant derives title, and the only question now to be considered is the validity of the sheriff's deed. It was ruled out below, and the plaintiff insists that the court therein committed error.

The statutes in force at the time of this sale (Ter. Laws, 121) then, as now, required that sheriffs' deeds should be acknowledged in the courts of the districts where the lands lie, and that the clerks of the courts should indorse upon every deed acknowledged by any sheriff a certificate of such acknowledgment, under the seal of the court, and to enter on the minutes a description of the lands and tenements sold, etc. The transcript from the record of the deed shows an indorsement of a certificate of acknowledgment made six years after the execution of the deed, but the certificate is not under the seal of the court, and it purports that the sheriff executed and acknowledged the instrument, when the deed was, in fact, executed by his deputy. There are other irregularities not necessary to be noticed, as the acknowledgment and certificate are so clearly defective that the only question to be considered pertains to the validity of a sheriff's deed when not acknowledged or certified.

A private deed, though defectively acknowledged, or even not acknowledged at all, is good between the parties and against subsequent purchasers with notice; and under our statute (Wagn. Stat. 595, §§ 35-6), the record of such deed, previous to December 12, 1855, would doubtless impart constructive notice.

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Ryan v. Carr.

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(See *Stevens v. Hampton*, *ante*, p. 404, and *Bishop v. Schneider*, *ante*, p. 472.) And in Indiana it is held that the deed of a sheriff, otherwise conforming to the law, is good as against the execution defendant, although not acknowledged. (*Doe ex dem. Wayman v. Naylor*, 2 Blackf. 32; *Dixon v. Doe ex dem. Lasalle*, 5 Blackf. 106.) The Supreme Court of that State applied to sheriffs' deeds the rule applicable to deeds between private parties, for the reason doubtless that no special provision is there made by statute for the acknowledgment of such deeds, leaving them to the operation of the law applicable to all conveyances.

But, as we have seen, the requirements of our statute were special and imperative, and it has always been considered that the acknowledgment in open court, and certificate of the same, are essential to the validity of the conveyance. Deeds by public officers can not receive the same liberal construction against the grantor as when made by private parties. The property of the execution debtor is conveyed against his will; the conveyance is not his act, but that of the law, and the law must be complied with.

It is well held in *Scruggs v. Scruggs*, 41 Mo. 242, that when an acknowledgment is properly made, and the certificate upon the deed is according to law, the purchaser who receives the instrument shall not be made to suffer from the neglect of the clerk in making an informal entry upon his record. But, as in the case at bar, if the purchaser voluntarily receives a deed, upon which the certificate is not only itself irregular, but which shows an irregular acknowledgment, he can not complain. The non-compliance with the law is patent, and if he is deceived, it is with his eyes open.

It is not necessary to say whether, if the plaintiff had introduced in evidence the record entry of the acknowledgment, and that had shown a compliance with the law, the defect in the certificate would have been cured. The question was raised, but not decided, in *Allen v. King*, 35 Mo. 216, the court in that case holding both the certificate and the record to be defective. Counsel contend that this defect is cured by the statute before referred to (sections 35 and 36 of the act concerning evidence), which



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 Gaston v. White et al.
 

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provides that records of instruments heretofore made, defectively acknowledged, shall impart notice, and that certified copies of ancient deeds may be read without proof of execution. But they wholly mistake the difficulty. This is not a defective acknowledgment of a deed good without any acknowledgment. The legal acknowledgment of a sheriff's deed is essential to its validity. No title can pass without it; and it does not matter whether other purchasers have notice or not. The sole object of this statute was to make the record of an instrument in writing—the instrument being good in itself, but defectively proven or acknowledged—operate as constructive notice, the same as though the proof or acknowledgment had been regular; and the last clause of section 36, added in 1868, admits certified copies of records made before 1837, without proof of the execution of the original instrument. But the act gives no validity to such copies if the original were invalid, and, as we have seen, the original deed did not comply with the law and could not convey title.

The other judges concurring, the judgment is affirmed.

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STEPHEN H. GASTON, Defendant in Error, v. HENRY C. WHITE  
et al., Plaintiffs in Error.

1. *Vendor's lien, where legal title is in vendor, a proceeding to foreclose vendee's equity—Equity may be sold under order of sale analogous to fi. fa.*—Where the legal title to real estate is in the vendor, proceedings to enforce his lien for the purchase money are not strictly such, but rather proceedings to foreclose the vendee's equity. If there is to be a sale, the proper way is to order the sale of the property, as in case of mortgages; but if a court should order defendant's equity to be sold, it would not be a void proceeding. And though the order of sale be analogous to a *fi. fa.* instead of to an order upon a mortgage, it would be valid and pass the equity.
2. *Judgment—Vendor's lien—Administrator—Revivor—Construction of statute.*—Where the vendor of real estate obtains a judgment to enforce his lien for the purchase money, and sues out execution, but dies prior to sale thereunder, a special execution, under the present statute (Wagn. Stat. 791, § 14), may be issued in the name of his administrators, without a revival of the judgment.

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Gaston v. White et al.

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*Error to Sixth District Court.*

*Redd, and McCabe & Pratt*, for plaintiffs in error.

I. The court erred in holding that the judgment and decree of sale to enforce the vendor's lien, and the execution sale and sheriff's deed, were void and did not divest plaintiff of his equitable interest in the land.

II. The suing out of an execution by the administrators of the deceased plaintiff, without a revivor of the judgment, is authorized by section 17, p. 904, R. C. 1855.

*Dryden, Lindley & Dryden*, and *Rush, Lipscomb & Anderson*, for defendant in error.

I. The sale by the sheriff under execution was no bar to Gaston's equity to have specific execution of the contract of sale.

II. After the death of the judgment creditor no execution could lawfully issue until the judgment was revived by *scire facias*. (2 Tidd's Pr. 1117-20; *Regina v. Ford et al.*, 2 Raym. 768; 2 Sandf. 6 a, note 1; 2 Raym. 1072; *Washington Ins. Co. v. Slee*, 2 Paige Ch. 365; 1 Williams on Ex'rs, 766; *Pennoir v. Brace*, 1 Salk. 319.)

BLISS, Judge, delivered the opinion of the court.

In 1858 Clement White, deceased, gave to the plaintiff a bond for a deed of the land in controversy. Soon afterward the plaintiff left the State, leaving the land in charge of said White, who rented the same and collected the rents. Gaston had executed to White his note at twelve months for the purchase money, and left with him some small claims to collect and apply upon it. In 1860 said White instituted proceedings in the Marion Circuit Court to collect the note and enforce his lien upon the property, made Gaston a party by publication, and, after crediting him with a balance of accounts between rents collected and sundry expenses, obtained judgment for \$3,652.60, with an order for a special execution against the property, directing the sheriff to sell the interest of said Gaston in the same. In 1862 Clement White died intestate, and letters were granted to two of the defendants.

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Gaston v. White et al.

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In January, 1863, these administrators, without revivor, sued out a special execution reciting the judgment, the death of White, and the letters of administration, which execution commanded the sheriff to sell the interest of Gaston in the property; and upon the execution the administrators caused a credit of over \$900 to be entered, for rents collected by deceased. The property was bid in by defendant, Henry C. White, for the benefit of the heirs of deceased, and for the sum of \$3,000, and the sheriff made him a deed. In a division of the estate this property was allotted to Henry C. and John White, and valuable improvements have been made upon it.

The present suit was instituted in 1863, against the heirs of Clement White, to enforce a specific performance of a title bond given him in 1858. We should have no hesitation in saying that in consequence of his laches in fulfilling his part of the contract, the plaintiff had no equity, but from the fact that the defendants, so far from taking advantage of such negligence and rescinding or even disregarding the contract, down at least to the time of the sheriff's sale, constantly affirmed it. Since then the possession has been in hostility to the claim of the plaintiff.

The defendants in possession chiefly rely upon their purchase of the plaintiff's interest at sheriff's sale. He, on the other hand, claims that he lost nothing by that sale, for two reasons: first, that the judgment was irregular, being for the sale of his interest instead of the property itself; and, second, that the execution possessed the same infirmity, and, in addition, was issued in the name of the administrators without being formally revived.

That irregularities and errors in the rendition of judgments do not affect the validity of sales under executions issued upon such judgments, is not disputed, although this doctrine does not go to the extent of validating sales under void judgments, as where the court had no jurisdiction. And, also, executions irregularly issued are generally held to be good, except in a direct proceeding to quash. (*Landis v. Perkins*, 12 Mo. 238; *Carson v. Walker*, 16 Mo. 68.)

Firstly, we are to inquire whether this was a void judgment—

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Gaston v. White et al.

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such a one as would not conclude the parties, although unreversed. Proceedings to enforce vendors' liens are usually had when the legal title is in the vendee; and there seems to be little necessity for them when the title is in the vendor. In the latter case they are not strictly proceedings to enforce liens—though, as in this case, they may be so designated—but rather to foreclose the vendee's equity. If there is to be a sale, the proper way is to order the sale of the property, as in case of mortgages; but if the court should order the defendant's equity to be sold, I can not see upon what principle it should be called a void proceeding. There is no statutory provision expressly applying to this class of cases. The defendant had only an equity. The whole matter was before the court and within its jurisdiction; and the order of sale, as actually made, though in analogy to a common *fi. fa.* instead of to an order upon a mortgage, must be held to be a valid one and to pass such equity.

We have, then, only to consider whether the special execution was properly issued in the name of the administrators, without a revival of the judgment. There is no doubt that a judgment of revivor is necessary unless dispensed with by the statute, and we think a fair construction of section 17, p. 904, Gen. Stat. 1865, then in force—and the same section is embraced in the present statute (Wagn. Stat. 791, § 14)—would authorize the issuing of this execution. The obscurity of the section arises from the attempt, in the same sentence, to provide for cases where one or more of several plaintiffs shall die, leaving a survivor, and where the sole or all the plaintiffs die. The first half of the section is clear enough, and provides that the judgment shall survive to the executor or administrator, or the heir or devisee, as the case may be, though one or more—which may be all—the plaintiffs die, but in the provision for execution without revivor there is more obscurity. By separating, rearranging, and filling the ellipses in this part of the section, it will be found to provide: first, for executions in the name of a surviving plaintiff; second, for executions in the name of the legal representatives of the deceased plaintiff or plaintiffs when all have died. And the section also provides that such executions shall be for the benefit, first, of the

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 State of Missouri v. Graham.
 

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surviving plaintiff and the legal representatives of his deceased co-plaintiff, and for the benefit of the legal representatives of the plaintiff or plaintiffs when all are deceased. Color is given to the construction claimed by the plaintiff, to-wit: that the section applies only to cases where one of several plaintiffs dies, by the phraseology of the last provision. But this provision is thrown in to enable the legal representatives of such deceased plaintiff to have the judgment revived in their favor, if they should deem it desirable, in order that they may be joined in the execution. No provision was necessary to meet a case where the plaintiff or all the plaintiffs had died, for it had already been made in section 4 of the same act.

Upon the construction we have given this statute, it will be seen that a judgment of revivor was not necessary in order that an execution might be issued; and inasmuch as the money sought to be secured by the sale belonged to the administrators of Clement White, they had a right to sue out the execution in their own name.

Upon this view of the case the judgments of the courts below must be reversed; and, as all the facts are before us, it is unnecessary to send the case back for any further proceedings. Independent of the legal questions raised upon the record, the plaintiff makes a poor show for the interposition of a court of equity, and his petition is dismissed. The other judges concur.

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STATE OF MISSOURI, Plaintiff in Error, v. JOHN GRAHAM,  
Defendant in Error.

1. *Crimes and punishments — Evidence as to facts after the commission of the act, showing animus.*—In the trial of an indictment for willfully and maliciously killing a hog, evidence on the part of the accused, showing his animus and intention, was competent in establishing his innocence, although it embraced facts subsequent to the killing.

*Error to Second District Court.*

*Geo. D. Reynolds and H. B. Johnson*, for plaintiff in error, cited 1 Whart. Crim. Law, § 699; *State v. Jackson*, 17 Mo. 544; *Green v. State*, 13 Mo. 382.



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State of Missouri v. Graham.

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*Reppy, Thomas & Williams*, for defendant in error, cited *State v. Matthews*, 20 Mo. 55 ; 37 Mo. 225.

WAGNER, Judge, delivered the opinion of the court.

The only question necessary to notice springs out of the action of the Circuit Court in excluding the evidence offered by the defendant. The defendant was indicted under the statute (Wagn. Stat. 462, § 55) for willfully and maliciously killing a hog, the property of one Huskey. After the evidence for the State was submitted, the prisoner introduced Samuel Herrington, his father-in-law, and offered to prove by him that on the morning of the day on which the prisoner shot the hog, he (Herrington) requested defendant to go into the woods where he had some wild hogs running and kill them ; that defendant went out with his gun and shot the hog, and after shooting it he returned to witness' house and stated that he had killed Huskey's hog, and asked what to do with it ; that witness sent his son and defendant with a wagon, with instructions to take the hog to Huskey and give it to him. This evidence was ruled by the court to be inadmissible. The defendant was then convicted and sentenced to pay a fine.

It is an admitted principle that after the commission of a crime the guilty party can not, by his own acts and declarations, make evidence in his favor. But in the present case, after the killing was proven, it was necessary and material to show with what intent the act was done. Evidence on the part of the accused, showing the *animus* and intention, was competent in establishing his innocence. The testimony which he offered to produce, showing that he was authorized and requested to kill Herrington's hogs running in the woods, was proper, and should have been admitted. It was important for him to show how he became engaged in killing hogs in that place and at that time. If he was simply pursuing his authority and killing what he supposed to be Herrington's hogs, it is obvious that he was guilty of no offense. And whether such were the facts, was a question to be passed upon by the jury. On a consideration of the whole evidence, we are unable to distinguish this case from *The State v.*

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Billion v. Walsh et al.

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Matthews, 20 Mo. 55, where similar testimony was declared admissible.

I think the District Court properly reversed the judgment of the Circuit Court, and its rulings will therefore be affirmed. Judge Currier concurs; Judge Bliss absent.

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MARY BILLION, Appellant, v. ISABELLA WALSH *et al.*,  
Respondents.

1. *Lands and land titles—Actions for recovery of lands, limitations to—Act in force at time action is commenced, and not when cause of action accrued, must govern.*—An action for real estate brought more than ten years from the passage of the act of 1847, and more than three years after the disability of the defendant had been removed (Sess. Acts 1847, p. 94, §§ 1, 4), was barred, even though the cause of action accrued under the limitation act of 1825, which permitted plaintiff to sue at a date subsequent in point of time to that limited by the act of 1847. And the case would not be taken out of the provisions of the act of 1847 by section 15 of the limitation act of 1855 (R. C. 1855, p. 1053, § 15). Under a proper interpretation of that section, plaintiff's action was subject to the laws in force at the time of the passage of the act of 1855, viz: the laws of 1847. The "laws" referred to in section 15 were not those in force when the right of action accrued, but when the act of 1855 took effect. And section 14 of the limitation act of 1865 (Gen. Stat. 1865, p. 747) does not enlarge the scope of section 4 of the act of 1847. Section 14 is a continuation of section 10, article II, chapter 103, R. C. 1855, and has no reference to suits for the recovery of real property.

*Appeal from St. Louis Circuit Court.*

McClure, and Dryden, Lindley & Dryden, for appellant.

Defendant can not set up this defense under the act of 1855, because the act provides that the limitation of the actions shall be governed by the law in force at the time the right of action accrued. (R. C. 1855, p. 1053, § 15; *id.* 1049, § 10.) This took effect on the first day of August, 1866.

Hill & Jewett, for respondents.

1. Ten years' adverse possession, since the act of 1847 (limiting to ten years), is sufficient to give title, though the right of

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Billion v. Walsh et al.

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possession or of action accrued before the passage of the act of 1847. (*City of Carondelet v. Simon*, 37 Mo. 408; *Callaway County v. Nolley*, 31 Mo. 393.)

II. Section 14, p. 918, Wagn. Stat., plainly relates to personal actions.

CURRIER, Judge, delivered the opinion of the court.

This is a proceeding in equity to set aside certain deeds, and to restore the plaintiff to the possession of the premises thereby sought to be conveyed. The controlling facts of the case are as follows: In 1812 Margaret Graham acquired from her father the title to the premises in controversy. She soon after intermarried with Michael Connell, who died in 1831 or 1832. Prior to his death, and soon after the marriage—namely, July 7, 1812—Connell and wife joined in the execution of a deed of the premises to Edward Hempstead, Mrs. Connell being at that time an infant under the age of twenty-one years. She died in the fall of the following year, and while yet a minor, and left the plaintiff as her only child and heir at law, the plaintiff herself then being but a few months old. In 1829 the plaintiff, she still being in law an infant, intermarried with Cyprian Billion, from whom she was divorced in January, 1862. This suit was brought in September, 1866, and consequently more than three years after Mrs. Billion, the plaintiff, became discoverd, and thus relieved of the legal disability resulting from her marriage.

Edward Hempstead, the grantee in the deed from Mr. and Mrs. Connell, took possession of the granted premises under the deed soon after its execution; and the evidence tended to show that such possession, under claim of title, was continued by him and those claiming under him from that time forward, a period of more than fifty years. The defendants mainly rely upon the statute of limitations as a bar to the suit. Does the limitation act of 1847 (*Sess. Acts 1847*, p. 94) apply to and govern the case? That is the only point it will be necessary to consider in this opinion.

The first section of the act referred to limits real actions to ten years from the date of their accrual; and the fourth sec-

tion provides a saving, to persons under disability, of three years. In the case at bar, as we have seen, the statute had run more than ten years when the plaintiff's disability of coverture ceased. We have also seen that the action was not brought till more than three years after the occurrence of that event. The case, therefore, falls clearly within the provisions of the act of 1847.

The plaintiff, by her counsel, insists, however, that the limitation act of 1825 (R. C. 1825, p. 510, § 2) applies to and governs the case. This act provided a general limitation of twenty years, with a saving to persons under disability of twenty years more—thus in certain cases enacting a limitation of forty years. The plaintiff claims the benefit of the twenty years' limitation, after the removal of disabilities. This claim is founded upon the theory that the provisions of section 15, article III, chapter 103, of the limitation act of 1855 (R. C. 1855, p. 1053, § 15) take the case out of the other provisions of that act, as also out of the other provisions of the act of 1847, and subject it to the limitation act of 1825. The section referred to (§ 15) provides as follows: "The provisions of this act shall not apply to any actions commenced, nor to any cases where the right of action or of entry shall have accrued, before the time when this act takes effect, but the same shall remain subject to the laws then in force." What are the "laws" here referred to? The laws in force at the time the act took effect, or at the time the right of action accrued? The plaintiff assumes the latter position, and claims that her right of action accrued in 1832, upon the death of Connell, when the limitation act of 1825 was in force, giving twenty years in which to sue, after the removal of disabilities, and that this latter act is the one that fixes the right of the parties. The position assumed is not sustainable. It is at variance with the letter and spirit of the law, and the whole tendency of legislation on this subject for the last generation. In 1835 the period for suing after the removal of disabilities was cut down one-half—namely, to ten years. In 1847 the Legislature took up the subject again, and reduced the limitation from ten to three years, and so the law has remained ever

since, showing a fixed determination on the part of the Legislature to limit the saving on account of disabilities to the period of three years.

In the limitation act of 1845 (R. C. 1845, p. 72, § 16) the section corresponding to that of section 15 in the limitation act of 1855, is in these words: "The provisions of this act shall not apply to any actions commenced, nor to any cases where the rights of action or of entry shall have accrued, before the first day of December, 1835, but the same shall remain subject to the laws then in force;" that is, subject to the act of March 16, 1835, which was in force at the time mentioned. Between 1835 and 1845 there was no modification of the limitation law, so that the act of 1835 was in force when the revised act of 1845 went into operation. The effect of the provision was therefore the same as that of section 15 of the act of 1855; that is, the law in force at the time of its enactment was to govern when the right of action had then already accrued.

Between 1845 and 1855 the important limitation act of 1847 was passed, and this accounts for the difference of phraseology between the two sections bearing upon this inquiry—namely, section 16 of the act of 1845 and section 15 of the act of 1855.

In 1845 it was sufficient to say—there having been no intervening changes—that the law in force in December, 1835, should apply to and govern rights of action then accrued. But in 1855 the condition of the law had been greatly changed by the act of 1847. The Legislature, therefore, not wishing to disturb the law of 1847, instead of enacting that the law of 1845 should govern in cases where the right of action had then already accrued, enacted that the law in force at the time the revised act should take effect should apply to and govern such cases. The law of 1847 was then in force, and consequently must control in all cases where the right of action had accrued at the time the subsequent act went into operation, provided the period limited in the act had run after its passage.

In accordance with this view are the prior decisions of this court. In *Callaway v. Nolley et al.*, 31 Mo. 393, the cause of action accrued in 1844, while the limitation act of 1835 was in force,



giving twenty years in which to sue. The action was commenced in 1859, more than ten years after the act of 1847 took effect, but less than twenty years from the time when the right of action accrued against the defendants. If section 15 of the act of 1855 took the case out of the statute of 1847, as the plaintiff here contends, and subjected it to the law of 1835, which was in force when the right of action accrued, then the action was not barred, for the twenty years had not run. But the court decided that the action was barred, and that it was subject to the act of 1847, notwithstanding said section 15. In delivering the opinion of the court, Judge Scott said: "The construction put upon the existing statute of limitations as to real actions is that when ten years have elapsed from the taking effect of the act (the act of 1847), the action is barred, although it first accrued under some other act of limitations, which gave a longer period within which to sue." The decision in *Carondelet v. Simon*, 37 Mo. 408, is to the same effect. These decisions must be taken as settling the point in issue adversely to the plaintiff's view.

The plaintiff's counsel, however, suggest that section 14 of the limitation act of 1865 (Gen. Stat. 1865, p. 747, § 14) enlarges the scope of section 4 of the limitation act of 1847. The section referred to is substantially the same as section 10, article II, chapter 103, of the revision of 1855. Section 10, in the act of 1855, relates exclusively to personal actions, and has no reference to suits for the recovery of real property. Its re-enactment is to be construed as a continuation of the old law, and not as a new enactment. (Gen. Stat. 1865, p. 883, § 5.) The substitution of the word "chapter," in the new arrangement of the statutes, in place of the word "article," under the old arrangement, manifestly was not designed to change the effect of the law; besides, the limitation of three years had elapsed when the General Statutes of 1865 took effect.

The plaintiff makes the further point that the limitation of three years does not bar the action, since the suit was commenced within one year next after the decision of a prior suit against her, namely: the suit of *Billion v. Larimore*, reported in 37 Mo. 375. In other words, it is sought to place the case under

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 Picot v. Douglass.
 

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protection of the statute which provides that where an "action shall have been commenced within the time respectively prescribed, \* \* \* and the plaintiff therein suffers a nonsuit, or after verdict for him the judgment is arrested, or after judgment for him the same is reversed on appeal or error, such plaintiff may commence a new action from time to time within one year after nonsuit suffered, or such judgment is arrested or reversed." (R. C. 1855, p. 1051, § 3.) The statute has no application to this case. The plaintiff in *Billion v. Larimore et al.* suffered no nonsuit, nor was the judgment in the cause either arrested or reversed. It was affirmed, and the judgment was against the plaintiff; and so the judgment against the plaintiff in the present suit will also be affirmed. The other judges concur.

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L. G. PICOT, Plaintiff in Error, *v.* THOMAS DOUGLASS, Defendant in Error.

1. *Ejectment — Sub-letting — Rescission — Rents and profits, testimony as to.*— Under an agreement between A. and B. for the sale of certain premises then in litigation, the deed was not to be required till the title was quieted, but B. was to have immediate possession, with full power to act in all things as if he had the absolute conveyance, taking to his own use the rents, issues, and profits. B. went into possession and sub-let to C. In ejectment by A. against C., *held*, that an application of A. for rescission of the contract by mutual consent was not a rescission, nor did it imply any breach or abandonment of the contract on the part of B.; and that, while his rights in the premises continued under the agreement, rents were properly paid to him by C., and could not be again recovered from C., and that testimony showing payment of money for rents and repairs by C. during that time was proper.

*Error to St. Louis Circuit Court.*

*L. G. Picot, pro se.*

*Hudgins & Son, and P. Leahy, for defendant in error.*

CURRIER, Judge, delivered the opinion of the court.

The plaintiff sued in ejectment to recover possession of certain premises in Carondelet. It is alleged in his first amended petition that he was entitled to possession on the first day of October,

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Picot v. Douglass.

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1866, and that the defendant, on the following day, entered into the premises, and that he unlawfully withholds possession. The truth of this averment is denied in the answer.

At the trial, which was by the court, two instructions were given at the instance of the defendant, declaring, in effect, that unless the plaintiff was entitled to possession on the day laid in the petition, he could not recover, and also a third instruction, declaring that under the pleadings and evidence the plaintiff could not recover. Upon the giving of these instructions, the plaintiff by leave filed an amended petition, wherein the ouster and right of possession were alleged a year and more later, to-wit: on the 6th of November, 1867. Whereupon the court, without any further instructions being either asked or given on either side, gave judgment for the plaintiff for possession and one cent damages.

The instructions mentioned above had no application to the case as made by the amended petition, and the court gave judgment in entire disregard of them, treating them as out of the case, and they must be so regarded. They were not renewed in either form or substance, as applicable to the case under the petition as finally amended.

The plaintiff won the case, but is dissatisfied with the damages assessed, insisting that he is entitled to the monthly value of the premises from November 6, 1867, to the date of judgment, amounting to some \$500 — whereas the damages allowed by the court were merely nominal. It appears that the plaintiff, on the 22d of May, 1866, bargained the premises to Mrs. Julia W. Blow, through a contract of sale made with her in connection with her trustee, James M. Loughborough. This contract of sale recited that the premises were in litigation; and for that reason it was provided that no deed should be required until the title to the property was quieted. It was, however, further provided that the bargainees should have immediate possession, "with full power to act in all things as if they had an absolute conveyance," taking to their use the rents, issues, and profits. The purchase money was \$9,000, to be paid in four years from the 15th day of May, 1866, with interest at six per cent., payable semi-annually. It was provided, nevertheless, that no more than twenty-five dollars per

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Picot v. Douglass.

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month of the interest should be paid, pending the litigation, although the six per cent. interest stipulated for amounted to forty-five dollars per month. The defendant went into possession of the premises on the 11th day of June, 1866, as Mrs. Blow's tenant, at a monthly rent of thirty-five dollars; and there was evidence tending to show that the renting was for three years, with a privilege of a fourth, and that the defendant had paid on account of the rent \$590 in cash and \$750 in the way of repairs and improvements. This testimony was admitted over the plaintiff's objections to its relevancy, and its admission is made a ground of objection here. The record presents no other question.

The plaintiff had contracted the premises to Mrs. Blow, granting to her the right to deal with them as her own, as "absolute owner" pending the litigation, taking the rents and profits. She was, therefore, clothed with the authority to rent them. She appears to have done so, and the defendant became her tenant. It was therefore proper for him to pay her the rents so long as her rights in the premises continued; and if he paid them to her they are not collectable of him again in this suit; that is, rents which accrued and were paid prior to the time when Mrs. Blow's rights in the premises ceased. When was that? It appears that she made application to the plaintiff, through her trustee, for a rescission of her contract November 6, 1867, basing her application on the fact of the continuance of the litigation. This application for a rescission by mutual consent was not a rescission, nor did it imply any breach or abandonment of the contract on the part of the applicant. What action the plaintiff took upon the application does not appear, but it does appear that Mrs. Blow made a second application for a rescission, basing it on the same grounds, August 18, 1868. In this second application it is stated that the "back interest," etc., would be paid in case the plaintiff would make to her a good title; and this is the first intimation of any default on the part of Mrs. Blow. The statement implies that there was some interest in arrear on the 18th of August, 1868, but how much does not appear; nor does it appear whether the interest referred to was the interest on the whole \$9,000 for one month or more, or whether

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Picot v. Douglass.

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it was simply the difference between the monthly payment of twenty-five dollars and the forty-five dollars per month which was accruing on the \$9,000. If the latter, it did not show her in default, for her contract required of her but the twenty-five dollars per month pending the litigation. At all events no cause of forfeiture against Mrs. Blow is shown prior to August, 1868, and down to that date it was legitimate, in any aspect of the case, for the defendant to show that he had in fact paid the rent to Mrs. Blow. The evidence objected to was relevant to that inquiry, and the plaintiff's objection to it was properly overruled.

This disposes of the case. It is true the court rendered a judgment for only nominal damages. But no question is raised as to the *quantum* of damages, except in the way of objection to the evidence, and that point has already been considered. It may be observed, however, that the evidence of a right of forfeiture in the plaintiff is slight and unsatisfactory, and there is no evidence whatever that the plaintiff ever asserted any such right, aside from the fact of the institution of this suit. There was evidence tending to show that the defendant had paid in cash and in the way of improvements a sum sufficient to cover his liability for rent down to the day of the rendition of judgment, and we discover no sufficient reason for disturbing the judgment of the court below.

The court committed no error apparent upon the record whereof the plaintiff has any right to complain. The judgment will therefore be affirmed. The other judges concur.

A motion for rehearing was made by plaintiff in error and overruled.



WM. B. BESSHEARS, Appellant, v. JOHN S. ROWE, Respondent.

1. *Frauds, statute of*—*Undertaking to pay debt of another being also to pay one's own debt, not in statute.*—Where a person, being indebted to the defendant in a judgment, undertook, by mutual agreement with the defendant and plaintiff therein, to pay the amount of the judgment to the latter, and by that act canceled so much of his own liability to the defendant, the promise was binding on him, although not in writing. When one undertakes to pay the debt of another, and by the same act also pays his own debt, which was the motive of the promise, the undertaking is not within the statute of frauds (Wagn. Stat. 656, § 5), and need not be in writing.
2. *Practice, civil*—*Proceedings under statute to reinstate judgment*—*Specific issues may be submitted to the jury.*—A proceeding under the statute (Wagn. Stat. 1137, §§ 14, 15) for the reinstatement of a judgment, whereof the record has been lost or destroyed, is not by motion, but upon petition and answer, as in ordinary cases at law; and the case need not be submitted to the court alone without the aid of a jury, nor need the opinion of the jury be taken upon the whole case, but the court is authorized by the statute (Wagn. Stat. 1041, § 13) to take their findings as to any specific questions of fact upon issues framed for that purpose, without being required to submit to them all the issues arising on the pleadings. The authority to do so is not limited to chancery proceedings.

*Appeal from Sixth District Court.*

*Hayden, Gatewood & Buckner*, for appellant.

I. The question at bar was exclusively for trial by the court, just as a motion to quash an execution, or to have satisfaction of a judgment entered of record.

II. But if it was proper to call a jury, then the whole issue should have been submitted to a jury, subject to instructions from the court. There is no warrant for framing special issues and submitting them to a jury. The only cases in which they are authorized are specified in sections 12 and 13, Wagn. Stat. 1041. This provision is well understood to apply to those cases under our practice which, before its adoption, would have been bills in equity; and this case not being a bill in equity or chancery proceeding, but purely statutory, it can not apply to it.

III. The contract of Brown to pay the debt of Rowe to Besshears, not being in writing, is within the statute of frauds, and was not obligatory on Brown. (Fullam v. Adams, 4 Am. Law

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Besshears v. Rowe.

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Reg., N. S., 460 *et seq.*, and note of Redfield, J.; Bro. Frauds, 201-3; *id.* 198; Curtis v. Brown, 5 Cush. 492; Nelson v. Boynton, 3 Metc. 396; Mallory v. Gillett, 21 N. Y. 412; Watson v. Randall, 20 Wend. 201.)

*E. A. Lewis*, and *McKee, Sanders & Carkener*, for respondent.

I. The issues of fact were properly framed and properly submitted to a jury. (Wagn. Stat. 1041, § 13; Morris v. Morris, 28 Mo. 114.)

II. The agreement in the case at bar was not within the statute of frauds. It was not a guaranty or undertaking on the part of Brown to answer for the debt, default, or miscarriage of Rowe, but a total extinguishment of Rowe's debt, and a new debt or obligation assumed by Brown on his own account, for valuable consideration.

CURRIER, Judge, delivered the opinion of the court.

This is a proceeding under the statute (2 Wagn. Stat. 1137, §§ 14, 15) for the reinstatement of a judgment rendered May 30, 1860, for \$1,224.70, the record of it having been destroyed. The answer admits the rendition of the judgment, and then proceeds to show a state of facts which are supposed to operate a release and satisfaction of it as against the defendant.

It is averred that defendant bargained to one Brown certain real estate, which was subject to the lien of a judgment, for the sum of \$3,250; that prior to a conveyance of the property it was mutually arranged between Brown (the plaintiff) and defendant, that the amount of the plaintiff's judgment should be deducted from the purchase money, and that Brown should pay that sum directly to the plaintiff; that the defendant should make an absolute conveyance to Brown, with the usual covenants of warranty, and that the plaintiff should release and discharge the defendant from said judgment, in consideration of Brown's verbal promise to pay it. It is further shown that this was a joint arrangement entered into by the three parties at the same time; that the defendant conveyed to Brown by warranty, and

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Besshears v. Rowe.

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that Brown assumed the payment of the judgment, and that he did pay a part of, to-wit: \$800.

Such is the substance of the answer. Assuming the facts to be as stated, was the defendant thereby discharged from the judgment? If Brown, instead of a verbal promise, had given his note to the plaintiff for the amount of the judgment, and the plaintiff had taken that in discharge of the judgment debtor, I suppose there would be no question that the transaction would have released the defendant effectually. Did Brown's verbal promise, in connection with the other facts, have that effect? That is the principal question for consideration.

It is claimed that Brown's verbal promise was void, as being within the statute of frauds. The statute provides that no action shall be brought to charge any person upon any special promise to answer for the debt of another, unless the promise is in writing and signed by the party to be charged.

Brown's undertaking was to pay the judgment debt against the defendant, and the undertaking was not in writing; it was merely verbal. Hence it is claimed that Brown's undertaking was within the statute, and therefore void. If that is so, it furnished no consideration for the agreement on the part of the plaintiff, and so the whole arrangement would fall to the ground.

The clause in the statute of frauds, referred to above, and upon which the plaintiff relies, has been the subject of a multitude of adjudications. The constructions of it have been various and conflicting. This rule, however, seems to be well established, and to rest on solid ground, namely: that when one undertakes to pay the debt of another, and by the same act also pays his own debt, which was the motive of the promise, the undertaking is not within the statute, and need not be in writing. In such a case the promise of the party is rather to pay his own debt than an undertaking to pay the debt of another. This doctrine is sustained by the following decisions among others: *Dearborn v. Parks*, 5 Greenl. 81; *Farley v. Cleveland*, 4 Cow. 432; *Barker v. Bueklin*, 2 Denio, 45; *Fullam v. Adams*, 37 Verm. 391. The opinion in *Fullam v. Adams* is thorough and exhaustive. See Judge Redfield's review of it in 4 Am. Law Reg., N. S., 478.

The facts alleged in the answer bring the case fully within the rule stated above. These facts, in substance, are that Brown purchased from defendant a quantity of land for a sum considerably more than sufficient to pay the defendant's indebtedness to the plaintiff; the defendant set apart enough of the purchase money to satisfy that indebtedness; and Brown verbally promised the plaintiff to pay to him the amount of the judgment, the defendant concurring therein; and the plaintiff, in consideration of the premises, agreed to discharge the judgment as against the defendant. In a word, Brown undertook, in concurrence with both the other parties, to pay the amount of the judgment to the plaintiff, and by that act canceled so much of his liability to the defendant. That promise was binding upon him, although not in writing.

But objection is taken to the mode of trial. The plaintiff, by his replication, put in issue the facts alleged in the answer, except as to the payment of the \$800. The court framed and submitted to a jury two specific issues of fact growing out of the pleadings. Under these issues the jury found substantially that the plaintiff, after the rendition of said judgment, agreed with defendant and Brown to accept the verbal promise of the latter in satisfaction of said judgment; and further, that such agreement was mutually entered into between the parties at or after the sale to Brown, and prior to the defendant's conveyance to him.

The defendant objected to the submission of these issues, claiming that the trial should be by the court alone, without the aid of a jury; and further, that if the opinion of a jury was taken at all, it should be upon the whole case as made by the pleadings, and not upon isolated facts.

In regard to this matter it is to be observed that this proceeding is not by motion, but upon petition, answer, and replication, substantially as in "ordinary cases at law." (Wagn. Stat. 1137, § 15.) In such cases, where the suit is not for the recovery of money alone, or of specific real or personal property, the court is authorized by the statute (Wagn. Stat. 1041, § 13) to take the opinion of a jury upon "any specific question of fact" involved in the trial, proper issues being framed and submitted to

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Hooper v. Ely.

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the jury for that purpose. The statute is broad and comprehensive in its terms, and recognizes no such limitations as the plaintiff insists upon. This is not an action for the recovery of money only, or of specific real or personal property, and we see no objection to the course adopted by the court in taking the opinion of a jury upon the issues submitted. The authority to do so is not limited to chancery proceedings. *Bray v. Thatcher*, 28 Mo. 124, was an equity suit to annul a deed, and the court submitted the whole case to the jury without framing specific issues for their consideration. That was held to be improper, as it undoubtedly was. But no one doubts the propriety, in such case, of taking the opinion of a jury upon specific questions of fact "by an issue made up therein for that purpose." That is exactly what the statute authorizes.

It being proper for the court to submit to the finding of a jury specific questions of fact, upon issues framed for that purpose, it follows that it was not the duty of the court to submit to the jury all the issues arising upon the pleadings. Besides, the plaintiff did not ask a jury, but objected to the case, or any part of it, going to a jury at all.

Judgment affirmed. The other judges concur.

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DAVID HOOPER, Appellant, v. DAVID A. ELY, Respondent.

1. *County Courts — Powers — County warrants — Absconding treasurer.*—

Although a County Court is endowed with large discretion in the management of its affairs, it has no authority to order the issue of a county warrant for amounts of money expended by the sureties of a defaulting and absconding county treasurer in bringing him back, even though they obtained from him a large proportion of the amount in arrears, where it further appears that the sureties were amply good for the deficit, and that there was no reason to suppose that he took with him any of the property of the county in specie. Such action of the court would not be in behalf of the county, but of the signers of the bond alone. And it would not affect their claim, that one of the judges had advised the step and assured them of his influence with the remaining judge to secure the issue of the warrant. Such a case would not be one of the injudicious exercise of a given power, but a naked assumption of power, in no wise granted, which it would be the duty of courts to check.



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Hooper v. Ely.

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*Appeal from Sixth District Court.*

*Blair & Hillis*, for appellant.

*Ellison & Ellison*, for respondent.

The County Court of Adair county had authority to issue the warrant. (*Boggs v. Caldwell & Co.*, 28 Mo. 586-8; 1 N. Y. Dig. 455, § 8; 34 Barb. 69-79; 21 How. 178; 12 Abb. Pr. 204-7; 2 Sandf. 460; *State v. Cooper County Court*, 17 Mo. 507; *Campbell v. Polk County*, 3 Iowa, 472; 18 Cal. 144.)

BLISS, Judge, delivered the opinion of the court.

The plaintiff, as a tax-payer of Adair county, obtained an injunction against the treasurer to restrain him from paying a certain county warrant, upon the ground that it was issued without authority of law, and also asked for an order upon defendant Ely, the holder, to bring it into court to be canceled. The injunction was finally dissolved, and the judgment was affirmed by the District Court.

• It appears that one Owenby, sheriff and collector of the county, had defaulted and absconded, and that defendant Ely and others, who were abundantly responsible, were upon his official bond. During a recess of the County Court, Ely proposed to one of the county judges to go after Owenby and bring him back, who advised him to do so, and said that he would use his influence with the other judges to make the county pay his expenses. Ely and one of his co-sureties pursued the defaulter, brought him back, and obtained indemnity for a large portion of their liability. They presented their claim to the County Court for expenses, etc., and were allowed the sum of \$1,632.35, for which the warrant in controversy was drawn. Afterward, in a suit upon Owenby's bond, judgment was entered by consent for over \$5,000, with a stay of execution for twelve months and an agreement that it might be discharged in county warrants. Defendants claim that it was part of the understanding that this particular warrant should be received in part payment; but it is clearly established that the county authorities did not so understand it,

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Hooper v. Ely.

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and that the probate judge, who had succeeded the old County Court, had already arranged with the county attorney to commence this proceeding.

We have only to inquire whether the County Court was authorized to allow the claim and order the warrant to be drawn. But little weight can be given to the encouragement given to Ely by the county judge before he left to pursue the defaulter. It could only go to the good faith of Ely, and could not of itself bind the county. If the County Court acted within the scope of its authority, the county is bound without it; if not, it is of no avail.

Had the court, then, a right to pay this bill? Counsel base the right upon its duty to audit claims and its power to control and manage the property of the county. The County Court, it is true, is authorized to audit and direct the payment of claims against the county; but they must be lawful claims. To allow any other, clearly transcends its powers, and its payment can be enjoined. The power to control and manage the real and personal property of the county must, it is true, involve the possession of a large discretion in such control and management. The exercise of that discretion may be wise or unwise, expenditures may be prudent or extravagant, yet so long as the court keeps within its authority, the warrants upon the treasury which it orders must be met. The Circuit Court can not control the exercise of a discretion vested by law in the county judges; and if, as in the case at bar, they are authorized to employ and pay sureties upon the official bonds of public officers, to bring back their absconding principals, or possess any general authority that would include that power, the particular mode of its exercise can not be questioned. But I am unable to see under what head such a grant of power can be classed. It is not seriously pretended that the absconding collector took with him any property in specie belonging to the county, to be recovered by his pursuers, nor that his sureties were not abundantly able to meet his cash liabilities. It may be admitted that if the liability had not been properly secured to the county, and there was a reasonable prospect of obtaining for the county what was actually obtained by the sureties, the County Court, as an incident to its power spoken of, and

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Reed v. Wangler.

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to its duty to enforce settlements with collectors, might incur reasonable expense in the pursuit of the defaulter. But in the case under consideration the county authorities did not act for the county, but for the signers of the bond alone.

The pursuers were not public officers; they obtained nothing for the county, although they did for themselves. No reward even was offered, or contract made; but after the sureties had done what they alone were interested in having done, by which they obtained a large indemnity for themselves, the county volunteered to pay the expense.

The statement of one of the judges, that he thought the defaulter, if brought back, might disclose something useful to the county in relation to its burnt records, is altogether too loose and indefinite an expectation upon which to found a public contract, even if one had been made in advance; and it does not appear that when the appropriation was made he had anything to show, or that any attempt even had been made to learn anything from him. The whole record plainly shows that the allowance was a mere contrivance to lessen the liability of the bondsmen, and, as the County Court could not abate it directly, this indirection does not validate their action.

This is not a case of an injudicious exercise of a given power, but is a naked assumption of power which it is our duty to check; and the judgments of the courts below are reversed and the cause remanded, with directions to the Circuit Court to make the injunction perpetual, and direct the holder of the warrant to bring it into court to be canceled. The other judges concur.

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SILAS REED, Plaintiff in Error, v. AUGUST WANGLER, Defendant  
in Error.

1. *Practice, civil*—Judgments rendered against persons formerly in military service within year after discharge, irregularity of—Statute, construction of.—A judgment can not be set aside on the ground of irregularity under the acts of May 15, 1861, and March 13, 1863 (Sess. Acts 1861, p. 46, and Sess. Acts 1863, p. 30,) simply because rendered against defendant within a year after his discharge from the military service of the United States. These

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Reed v. Wangler.

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acts do not prohibit the institution or prosecution of suits against persons in the military service, but they merely secure to such persons, when sued, the right to delay the trial and put off the final judgment until twelve months after their discharge. And the party, in order to avail himself of the right, must claim it at the proper time and place; otherwise he will be held to have waived it.

*Error to First District Court.*

*Hill & Jewett*, for plaintiff in error.

*Charles Jones*, for defendant in error

CURRIER, Judge, delivered the opinion of the court.

The plaintiff seeks to set aside a judgment of the Gasconade Circuit Court upon the ground that its rendition was irregular. He avers that the judgment was rendered against him within one year next following his discharge from the military service of the United States. It is therefore claimed that under the legislative acts of May 15, 1861, and of March 17, 1863 (Sess. Acts 1861, p. 46; Sess. Acts 1863, p. 30), the judgment was unwarranted, and that it ought, consequently, to be annulled.

The acts referred to have been construed not as prohibiting the institution or prosecution of suits against persons in the military service, but as securing to such persons, when sued, the right to delay the trial and put off final judgment until twelve months after their discharge from such service. (*Bruns v. Crawford*, 34 Mo. 330; *Donnell v. Stephens*, 35 Mo. 441.) The practical effect of the enactments, therefore, was to secure to persons in the military service the right, when sued, to have their cases continued from term to term until twelve months after their release from military duty. But the party, in order to avail himself of the right, must claim it, and claim it at the proper time and place, or he must be regarded as having waived it.

A party in the military service was not bound to have suits against him continued. He might insist on his trial, as he might insist on or waive his right to a continuance. If he would insist upon the continuance and the consequent delay of trial and postponement of judgment, he should in some proper way



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Atkinson v. Stewart.

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make the court acquainted with the facts entitling him to the desired delay. The court could not, without proof, take judicial notice of such facts. The court could not judicially know that Dr. Reed was or ever had been in the military service of the country. That was a matter for him to show, but he made no showing of the kind, nor did he ever claim a continuance in virtue of the statute. The case shows this, and Dr. Reed testified that he paid no attention to the suit "after the law passed;" that he did not so much as write to his attorney in reference to the case during the year 1864, although the suit had then been pending some four years, and notwithstanding he had an attorney employed in the case prior to the passage of the law. The judgment complained of was rendered in September, 1864, without any fault on the part of the court rendering it. If there was any fault on the part of any one, it was the fault of the present complainant in neglecting a long-pending suit. He wholly omitted to claim a continuance under the statute, and he must now submit to the consequences of his own remarkable negligence.

Judgment affirmed. Judge Wagner concurs; Judge Bliss absent.

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SARAH A. ATKINSON, Respondent, v. ELIAS C. STEWART,  
Appellant.

1. *Dower — Mortgage — Relinquishment of dower in payment of mortgage by assignee before foreclosure, out of money of husband — Wife's claim for dower.*—Where the grantee of land gives a mortgage to secure payment of the purchase money, his wife relinquishing her dower therein; and afterward the husband's assignee, during his lifetime, sells his property, including the land encumbered, and, with the money derived from the sales, pays off the encumbrance before foreclosure of the mortgage, the wife will not be barred of her dower in the estate.

The general principle is that where the husband dies leaving encumbered real estate, the widow takes her interest therein, if at all, charged with the encumbrance; and if any one interested in the estate—as heir or purchaser—discharges or redeems the encumbrance, he thereby acquires an equitable lien on the estate which he may hold against the widow till she contributes her



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Atkinson v. Stewart.

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proportion of the charge, according to the value of her interest. But the principle can not apply to the case supposed, for there payment would be in effect payment by the husband, and would operate as a complete annihilation and extinguishment of the encumbrance; and it is immaterial that in such case the purchase money may have gone toward payment of the encumbrance.

*Appeal from Sixth District Court.*

*Cunningham & Edwards*, for appellant.

I. Where the purchaser of an equity of redemption pays an outstanding mortgage, made by his grantor, in which his wife had released dower, the mortgage will not be deemed to be merged. And where one of several persons interested in a mortgaged estate redeems it by paying the whole debt, he does not thereby relieve the other portions of the estate from the charge, but becomes an equitable assignee of the mortgage as to these parties, and may hold, as mortgagee, until the respective owners thereof shall contribute *pro rata* toward the mortgage debt, according to the value of their respective shares of the estate. (2 Washb. 166; Sto. Eq., § 1023; 4 Kent's Com. 163; 5 Pick. 146.)

II. If any one interested in the estate, as heir or purchaser, discharge or redeem the mortgage, he thereby acquires an equitable lien upon the estate, which he may hold against the widow till she contributes her proportion of the charge, according to the value of her interest. (1 Washb. Real Prop. 216, § 21; Eaton v. Simonds, 14 Pick. 98; Swaine v. Perine, 5 Johns. 482; Gibson v. Crehore, 5 Pick. 146; Strong v. Converse, 8 Allen, 560; 1 Scrib. Dow. 509, § 22; Peltz v. Clarke, 5 Pet. 481.)

III. The owner of any interest or fractional part, however small, of the mortgaged premises, may redeem. But, in order to do so, he is obliged to pay the whole debt, and by such payment he will become substituted in equity in place of the mortgagee. (2 Washb. Real Prop. 164, §§ 19-21, and cases there cited; 38 Mo. 223; 1 Scrib. 515, § 30.) If one who has the right to redeem a mortgage and to require an assignment of it to him for his protection, pays it, and a full satisfaction is indorsed upon the mortgage, it may still be between the parties interested held as a subsisting security, and payment

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Atkinson v. Stewart.

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will be held as a purchase of the party making it. The payment of the money created a trust for the parties advancing it. (15 Pet. 36; 2 Washb. 198, § 11.)

*H. C. Lackland*, for respondent.

I. The deed of trust was a mere authority to the trustee to convey her dower in the event that the debt should not be paid; and the relinquishment of dower was not to take effect until the trustee exercised his authority by selling the land and making a deed therefor to the purchaser. The trustee never exercised that authority, and never can, because the encumbrance is paid and satisfaction entered on the margin of the record in the lifetime of the husband. The deed of trust is dead, the authority and office of trustee is at an end, and the title to the land is no more affected than if the deed of trust had never existed.

II. Even if the deed of trust had remained unpaid, it would have been no bar to the widow's dower as long as there was no sale under it. Much less can it be so after it has become *functus officio*.

III. Subrogation to the rights of the mortgagee, by the purchaser, was impossible in this case. (*Jones v. Bragg*, 33 Mo. 337; see also *Eaton v. Simonds*, 14 Pick. 98.)

WAGNER, Judge, delivered the opinion of the court.

This action was brought by the respondent for the purpose of obtaining dower in a tract of land of which her husband was seized and possessed in his lifetime. The record discloses that in 1847 John Atkinson, the deceased husband, purchased the land in controversy of George Collier, and, to secure the payment of the purchase money, he executed a mortgage on the premises conveyed. In 1855 Atkinson intermarried with the respondent, and in 1857 he made and executed a deed of trust to Francis Yosti, as trustee, to secure the payment of the same debt to Collier's executors. In this deed of trust the respondent joined, and acknowledged that she relinquished her right of dower. Atkinson becoming embarrassed, made an assignment in 1859, and con-

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Atkinson v. Stewart.

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veyed and assigned all his real estate, including this land, with others, to Thomas W. Cunningham, for the benefit of his creditors, and in 1867 he died.

The assignee, in pursuance of an order of court, sold all the land, and at the sale the appellant became the purchaser. With the money arising out of said sale the assignee paid off the debt due and owing to Collier's estate, and by virtue of a power of attorney from the executors, Yosti entered satisfaction on the record, acknowledging payment of the mortgage and deed of trust. The court below found that the widow was entitled to dower, and it was accordingly assigned to her. From that decision an appeal was taken.

The counsel for the appellant, in a very learned and elaborate argument, insists that as the purchase money went to extinguish the encumbrance, the widow is not entitled to be endowed, and that the appellant, as purchaser, stands in the place of the mortgagee.

We do not think that the doctrine of subrogation is applicable to this case. A mortgagor will be subrogated to the place and the rights of the mortgagee in respect to the mortgage debt, when it is necessary in order to accomplish the purposes of justice, even against the person claiming under the mortgagor himself. For instance, if a mortgagor sells the mortgaged estate subject to the payment of the mortgage, and the holder of the debt thereby secured calls upon the mortgagor to pay the same, and he thereupon pays it, he will, by so doing, become at once subrogated to the place of the mortgagee, with a right to reimburse himself out of the mortgaged premises. And this would be equally so, though the premises were held by a purchaser from the vendee of the mortgagor. In equity the mortgaged estate in such case becomes the primary fund out of which the debt is to be paid. (2 Washb. Real Prop. 200; Dixon's Subr. 86-93.)

This doctrine of equity rests upon the principle that the mortgage, being upon the debtor's property, and intended as security for the payment of the debt, shall be so held by any one having a right to recover the debt from the principal debtor. But there can be no pretext whatever for saying that the appellant in this

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Atkinson v. Stewart.

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case ever stood in the position of creditor to Atkinson, or that he ever had any right to recover the debt from him.

The general principle is that where the husband dies leaving encumbered real estate, the widow takes her interest in the estate, if at all, charged with the encumbrance; and if any one interested in the estate, as heir or purchaser, discharges or redeems the encumbrance, he thereby acquires an equitable lien upon the estate, which he may hold against the widow till she contributes her proportion of the charge, according to the value of her interest. But in the present case the appellant received his deed in 1860, and the husband did not die till 1867, long after the debt had been paid from the very proceeds of the husband's property.

In the case of *Jones v. Bragg*, 33 Mo. 337, Garth sold Jones a tract of land. Jones paid part of the purchase money and gave to Garth a mortgage of the land to secure the payment of the remainder, in which mortgage his wife, the plaintiff, joined, relinquishing her dower. Jones died, leaving a portion of the purchase money, which was secured by the mortgage, unpaid. His administrator, under an order of sale made by the County Court, sold the land to the defendant for a full price. At the sale by the administrator he announced that he would sell the fee simple (and not merely the equity of redemption), and would apply so much of the money accruing from the sale as might be necessary for that purpose, to the extinguishment of the mortgage. He paid off the mortgage by authorizing the defendant to pay off the same, and accepting the payment so made by the defendant as a payment on account of his bid for the land. The defendant paid the administrator the remainder of his bid. The plaintiff brought suit for her dower in the land, and the defendant set up the facts as above recited as a bar to her claim; and it was held that the mortgage was no defense to a suit for dower by the widow against the purchaser. That case is not distinguishable from the one now under consideration. In the present case, it must be observed, there was no sale under the deed of trust. There was no equitable assignment to the appellant, for the trust deed was discharged from the money of Atkinson. When the assignee, acting under Atkinson's authority,



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Atkinson v. Angert.

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paid off the lien with the money arising out of the sale of Atkinson's property, it was in effect a payment by Atkinson himself, and operated as a complete annihilation and extinguishment of the encumbrance. The deed of trust being paid off and dead, it has lost all vitality and can no longer subsist or be used for any purpose whatever. It is of no consequence that the original mortgage and the deed of trust were both in existence and on record at the same time; they were both given for the same debt, and the payment of the deed of trust would have discharged both had no satisfaction been entered on the record acknowledging payment of the mortgage.

No foreclosure or sale having taken place under the deed of trust, and the debt having been paid with the money of the husband, I think that the respondent was clearly entitled to dower, and therefore the judgment should be affirmed. The other judges concur.

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SARAH A. ATKINSON, Respondent, v. HENRY ANGERT, Appellant.

1. *Dower — Mortgage, payment of by purchaser of equity of redemption — Effect regarding claim for dower.*—Although there may be some cases where the purchaser of an equity of redemption, by paying the mortgage debt and taking an assignment of the mortgage, can protect himself against a demand for dower by the widow of the mortgagor—she having relinquished her dower in the deed—so that she will only be allowed to come in by proceeding in equity, and contributing her proportionate share toward the extinguishment of the legal charge; yet where the purchaser, without taking an assignment, and without any attempt to keep the mortgage alive, pays off the encumbrance absolutely and unqualifiedly, and no mistake was alleged or pretended in the cancellation or entry of satisfaction, it would be effectually dead, and the widow's relinquishment of dower being destroyed with it, her right of dower would remain in full force. The doctrine of subrogation can not apply to such cases; and it makes no difference that the purchaser was advised and supposed that a discharge of the mortgage would be equally beneficial to him as an assignment.
2. *Lands and land titles — Merger — Legal and equitable estate.*—The rule of law is inflexible, that where a greater and less estate meet and coincide in the same person, in one and the same right, without any intermediate estate, the less estate is immediately annihilated or merged; and the rule applies to the union of the legal with the equitable interest. Yet this rule is not inflexible with courts of equity, but will depend on the intention and interest of the person in whom the estates unite.



*Appeal from Sixth District Court.*

*Cunningham & Edwards*, for appellant.

If any one interested in an estate, as heir or purchaser, pay the encumbrance and discharge the mortgage, he acquires an equitable lien upon the estate. (1 Washb. Real Prop. 216, § 21; 1 Scrib. Dow. 510, § 22; Chappell v. Allen, 38 Mo. 223; Furnold v. Bank of the State of Missouri, 44 Mo. 336.) And where the purchaser of an equity of redemption pays off an outstanding mortgage made by his grantor, in which his wife had released her dower, the mortgage will not be deemed to merge; and where one of several persons interested in a mortgage estate redeems it by paying the whole debt, he does not thereby release the other portions of the estate from the charge, but becomes an equitable assignee of the mortgage as to the parties, and may hold as mortgagee until the respective owners thereof shall contribute *pro rata* toward the mortgage debt, according to the value of their respective shares of the estate. (2 Washb. Real Prop. 166, 3d ed.; Sto. Eq., § 1023; 4 Kent's Com. 163; 5 Pick. 140.) If any one interested in the estate, as heir or purchaser, discharges or redeems the mortgage, he thereby acquires an equitable lien on the estate, which he may hold against the widow till she contributes her proportion of the charge, according to the value of her interest. (1 Washb. Real Prop., *supra*; Eaton v. Simonds, 14 Pick. 98; Swaine v. Perine, 5 Johns. Ch. 509; Peltz v. Clarke, 5 Pet. 481.) The owner of any interest or fractional interest, however small, of the mortgaged premises, may redeem; but, in order to do so, he is obliged to pay the whole debt, and by such payment he will become substituted in equity in place of the mortgagee. (2 Washb. Real Prop. 164, §§ 19-21; 1 Scrib. Dow. 515, § 30; Chappell v. Allen, 38 Mo. 223.)

*H. C. Lackland*, for respondent.

I. In the case at bar, the deed of trust was paid off and extinguished, and became dead immediately, and the widow's relinquishment died with it long before the death of the husband.

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Atkinson v. Angert.

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There never was any assignment of, or intention to assign, the deed of trust, and the title to the land was no more affected by it than if it had never existed. (Eaton v. Simonds, 14 Pick. 98.)

II. It is impossible to apply the doctrine of subrogation as against the widow in such a case, under our statute law. (Jones v. Bragg, 33 Mo. 337.)

WAGNER, Judge, delivered the opinion of the court.

The facts in this case are similar to those in the case of Atkinson v. Stewart, *ante*, p. 510, except that in Stewart's case the deed of trust was to secure the payment of purchase money, and was paid off and discharged by the assignee out of the assets of the estate of the husband. In this case the deed of trust signed and acknowledged by the wife was to secure a certain sum of money borrowed by the husband, and the purchaser at the assignee's sale bought the property subject to the encumbrance, and paid off the same during the lifetime of the husband, and entered satisfaction on the record. After payment of the debt and acknowledgment of satisfaction on the record, the purchaser at the assignee's sale conveyed the property to the defendant, who is now resisting this suit. The question is whether the payment of the debt and entry of satisfaction by the purchaser was such an extinguishment as enabled the widow to claim her dower.

There may be cases in which the purchaser of an equity of redemption, by paying the mortgage debt and taking an assignment of the mortgage, can protect himself against the demand for dower, and the widow will only be allowed to come in by proceedings in equity, and contributing her proportionate share toward the extinguishment of the legal charge. But in the present case the purchaser, without any assignment or attempt to keep the mortgage alive, paid it off absolutely and unqualifiedly; and as no mistake is alleged or pretended in the cancellation or entry of satisfaction, it was effectually dead and incapable of being used for any purpose.

The case of Eaton v. Simonds, 14 Pick. 98, is in point. It was a bill in equity, and the complainant had joined with her husband in mortgaging a portion of his estate. The equity of redemption

was afterward sold to the defendant on an execution issued against the mortgagor, and the defendant during the lifetime of the mortgagor having paid the amount due to the mortgagee, claimed an assignment of the mortgage; but the mortgagee declaring that an assignment would be unnecessary, the mortgage was discharged upon the margin of the record in the registry of deeds.

It was held that this discharge was an extinguishment of the mortgage and not an equitable assignment, and that the widow was entitled to dower in the land free from the encumbrance of the mortgage.

Wilde, J., in delivering the opinion of the court, disposed of the question arising upon the discharge of the mortgage, as follows: "But this discharge, the defendant's counsel contend, will operate as an equitable assignment, as it was so intended to operate by the parties, and that the union of the legal and equitable titles may well exist without producing the effect of a merger or the extinguishment of a mortgage. Perhaps this might be so if the discharge could be considered as an assignment of the mortgage. The general principle is, that when the purchaser of a right to redeem takes an assignment, this shall or shall not operate as an extinguishment of the mortgage, according to what the interest of the party taking the assignment may be, and according to the real intent of the parties. (*Gibson v. Crehore*, 3 Pick. 482.) But Chief Justice Savage remarks, in the case of *Coates v. Cheever*, 1 Cow. 460, "that the spirit of the case seems to be this: that where the tenant in possession enters by virtue of a purchase from the mortgagor, then the subsequent purchase of the mortgage by him is an extinguishment. And that case was decided upon that principle. The same principle is laid down in *James v. Morey*, 2 Cow. 301, and in other cases; *Forbes v. Moffatt*, 18 Ves. 390; *Gardner v. Astor*, 3 Johns. Ch. 53.

The rule at law is inflexible, that where a greater and a less estate meet and coincide in the same person, in one and the same right, without any intermediate estate, the less estate is immediately annihilated or merged; and the same rule applies to the union of the legal estate with the equitable interest. But this

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Atkinson v. Angert.

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rule is not inflexible with courts of equity, but will depend on the intention and interest of the person in whom the estates unite.

In the present case, however, the doctrine of merger is not applicable, for the estate in the mortgage of William Eaton was never assigned to the defendant and never vested in him, so that it could not unite with the equitable title in him so as to operate as a merger. But this mortgage has been legally discharged; the debt has been paid, and could no longer be set up as a subsisting title either at law or in equity."

It makes no difference that the defendant was advised and supposed that a discharge of the mortgage would be equally beneficial to him as an assignment. This was a mistake which this court has no power to correct. (*Runyon v. Stewart*, 12 Barb. 537, also in point.) In the case at bar there was no foreclosure or sale of the premises under the deed of trust, the equity of redemption was sold by the assignee, and the purchaser, without taking any assignment, paid off the mortgage debt and extinguished the legal encumbrance. This extinguishment effectually destroyed the relinquishment and left the wife's right of dower in full force. As remarked in the case of *Atkinson v. Stewart*, we do not think that the doctrine of subrogation is applicable to these cases; and it may be further said that the common-law principles by which dower is obtained and lost, and to which most of the authorities cited by the counsel for the appellant refer, have been essentially modified by our statute.

From the best consideration we have been able to bestow upon the subject, we are of the opinion that the judgment of the court in awarding dower should be affirmed. Some minor points have been discussed, but their decision can not change the result, and we deem it unnecessary to examine them.

Judgment affirmed. The other judges concur.



JAMES HARRISON, Appellant, v. ANSYL PHILLIPS, Respondent.

1. *Revenue—State collector defaulting, sureties of—Money deposited by collector, recovered by surety in garnishment proceedings, will be held in trust for remaining sureties, when.*—After the debt due by a defaulting principal has been paid by his sureties, in ratable proportions, each of them becomes an independent creditor of the principal, and if any one should succeed in collecting his debt, the other creditors would have no claim whatever upon that fund.

But when the principal is a State collector the rule is different. The moment collections come into his hands they become the property of the State. Under the law (Sess. Acts 1863, p. 76, § 49) it became his duty to deposit them in the Bank of the State of Missouri; but his failure to do so would not operate to divest the State of its specific interest, and it might follow the fund, by suitable action, into any bank where deposited, and fasten upon the account created by it. Nor can the requirement of his official bond, with summary remedy upon default, be construed as divesting the title of the State to that fund. Such a deposit becomes a debt to the State, and none the less so because the collector might have discharged it by drawing out the money. And where the sureties on the collector's bond were compelled to pay out a liability on his part which this fund, if collected, would have gone to extinguish, it should, in equity, be transferred to such sureties.

Hence, if one of the sureties brings suit against the collector for the ratable share paid out by him, and recovers the sum by garnishment against the bank where the fund was deposited, on every principle the sum should be held by him as trustee for the use of all the sureties as the equitable owners, and no superior diligence on the part of the attaching surety could despoil the others. It is not as among equal judgment creditors, where the first levy gives the priority; for in that case there is no ownership, but only a lien, and the levy and sale become necessary to transfer the property. But the surety, in making contribution, will be entitled to deduct the costs and expense incurred by him in collecting the amount.

*Appeal from St. Louis Circuit Court.*

Edward W. Shands was duly appointed and qualified as collector of the State and county revenue within and for the county of St. Louis, in the State of Missouri, for the year 1860, and until his successor should be duly appointed and qualified. The said Shands filed his official bond for \$500,000, dated February 23, 1860, wherein said Shands was principal. The bond was conditioned for his faithful discharge of his duties as collector, and paying over to the State and county aforesaid all money collected. Shands, while acting as collector and holding said office, failed to pay over the sum of \$24,483.18 of the revenue



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Harrison v. Phillips.

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collected by him or his deputies; and on the 23d day of June, 1862, the State of Missouri, through its auditor, Wm. S. Mosely, sent a copy of said Shands' account as collector to his sureties, showing said balance of \$24,483.18 against him, and calling upon them for payment in order to avoid further steps. Thereupon the solvent sureties paid in said amount, each paying an equal portion thereof.

Said Shands, of the revenue so collected by him, deposited the sum of \$2,878.83 in the State Savings Association of St. Louis, which sum was not made a special deposit, but was deposited in his name as collector.

On the 11th day of December, 1863, the defendant in this suit, Ansyl Phillips, instituted an attachment suit in his own name against Shands to recover the money paid by said Phillips to the State of Missouri, as bondsman. In this suit Phillips caused said State Savings Association to be garnished as the debtor of said Shands, and, after regular proceedings to that end were had, recovered of the garnishee the said sum of \$2,878.83, less \$39.15, costs of said suit.

*Cline, Jamison & Day*, for appellant.

I. When the sureties made good the deficit to the State, in equity all right to the money at the State Savings Association passed from the State to the contributing sureties in proportion as they had paid, subject only to all equities of innocent holders and claimants; and its acquisition by one of the sureties at any time thereafter, whether by legal process or voluntary payment, would in equity inure to the benefit of all, and could in no wise break the right thereto that resulted in their favor at the instant they paid the State. The diligence of one in reducing it to possession is the diligence of all, subject to all reasonable expenses incurred in getting the same, as their relation to each other in reference to this fund disabled each from acting for himself in reference thereto as against the interest of the others. The relation they bore to each other and to this fund made each one a trustee for all in relation thereto, and disabled each from acting for himself alone in its acquisition. (*Furnold v. Bank of the*

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Harrison v. Phillips.

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State of Missouri, 44 Mo. 336; Seeley's Adm'r v. Beck, 42 Mo. 143; Cole County *et al.* v. Price *et al.*, 12 Mo. 132; Miller v. Woodward *et al.*, 8 Mo. 169; McCune v. Belt *et al.*, 38 Mo. 293.) Had this been the money of Col. Shands, the defaulter, and not the property of the State, then the rule would be different, and no equity could attach thereto as between these sureties. Vigilance could then claim her reward.

II. The extraordinary remedy of distress provided by the statute, in the first instance, against the collector and his sureties in case of default on the bond (R. C. 1855, pp. 1542-4), takes from the State none of the ordinary rights secured to it by law to pursue any remedy the State should see fit to adopt in the premises to secure money or its proceeds, belonging to the State, in the hands of her defaulting trustee or officer, whether in his possession or placed by him in the hands of another, or any property or chose in action into which it had been unlawfully converted by the agent of the State.

*Ewing & Holliday*, for respondent.

I. The liability of the defendant can be maintained only, if at all, upon the theory that a surety who pays a debt is entitled to stand in the place of the creditor as to all liens and equities to which he has a right to look as a security for the payment of his debt. The present case can not come within the operation of that principle, unless it be shown that before and at the time the plaintiff and other sureties of Shands paid the debt of the latter to the State, the State had a valid and subsisting lien upon the indebtedness of the State Savings Association to Shands — such a lien as a court of equity would have enforced at its instance for satisfaction of its debt. (1 W. & T. Lead. Cas. Eq. 131-72; 4 Mete., Ky., 247.) Shands was the collector of the revenue, and gave bond for the faithful performance of his duties. This was the only indemnity the State ever had. Shands, by the deposit of money with the State Savings Association, became its creditor, and the same relation of debtor and creditor was thereby created that results from a deposit in any other case. The deposit by Shands was neither to the credit of the State nor the

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Harrison v. Phillips.

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county, and whether to the credit of Edward Shands, or to Edward Shands, collector, is wholly immaterial. How could the State have a lien under such circumstances? This money, when deposited, passed into the funds of the bank, and the bank became liable to Shands for the amount of money deposited, and not for any specific fund. The bank became the debtor of Shands, and of no one else. The remedy provided for the State to recover this amount due from the collector on settlement is most summary, full, and complete—by the issue of a warrant of distress against such delinquent and his securities. (R. C. 1855, p. 1542, § 3.) The remedy is summary and complete as long as the principal or sureties are solvent, and there could be no equity if the redress is complete at law; and, on this distress warrant, the bank could have been garnished immediately for this very indebtedness. No resort to equity is necessary to reach this indebtedness.

II. The State had no lien upon this indebtedness of the State Savings Association to Shands, because the money deposited, that created the indebtedness, did not belong to the State. Shands was collector of the State and county revenue. It was his duty also, under the law, to collect the school fund. The State taxes and county taxes are, by law, assessed in the same tax book and collected on the same tax bills. For the State taxes the collector is responsible to the State, and for the county taxes to the county. It can not be said that the collector receives any certain distinguishable part of the money collected by him for State taxes, and another distinguishable part for county taxes. An action of replevin, or for the claim and delivery of personal property, as we now term it, could not lie in favor of the State against the State Savings Association for this money, even had Shands made a special deposit of the actual money collected by him.

III. The sureties in this case each paid his own proportion separately; consequently their legal demands against the principal are in their nature several, and they can not join in suing the principal. (Messer v. Swan, 4 N. H. 482, 488; Lombard v. Cobb, 14 Me. 222; Gould v. Gould, 8 Cow. 168.) In all the

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Harrison v. Phillips.

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reported cases where sureties have been compelled to divide with their co-sureties, the money or property so divided will be found to have been received while the interests of the sureties were joint and not several. In the case at bar, nothing was received by Phillips until nearly two years after each of the sureties had paid his several portion of Shands' indebtedness to the State. (Agnew v. Bell, 4 Watts, 31, 33.)

IV. When the sureties paid the debt they were at once subrogated to the rights of the State, if any, and entitled to enforce, each for himself, all the State's liens, priorities, and means of payment. Their claims against Shands being several, all stood on an even plain as to liens, rights, and priorities. The principle or maxim then applies, *vigilantibus non dormientibus jura subveniunt*. Where judgments have equal effect as liens upon the real estate of the debtor, the creditor who first levies his execution upon the land subject to the lien thereby acquires a priority and is entitled to be first paid out of the proceeds of the sale. (Bruce v. Vogel, 38 Mo. 100; Smith v. Lind, 29 Ill. 24; Adams v. Dyer, 8 Johns. 347; Waterman v. Haskins, 11 Johns. 228.)

BLISS, Judge, delivered the opinion of the court.

The right of the plaintiff to a proportionate share of the money recovered by the defendant depends entirely upon the relation held to it by the State. If it had become the property of the State and not before credited to Shands, or if the State had any specific claim to or lien upon it, as security for his debt, then the sureties of Shands, by the payment of his defalcation, became subrogated to the rights of the State; they are each entitled to a share of the fund, and the defendant has collected what belongs to them all. (W. & T. Lead. Cas. 3d Am. ed., 144-6, notes and cases cited; Furnold v. Bank of the State of Missouri, 44 Mo. 336; Sarpy's Adm'x v. Berthold, *post*, p. 557.) But if the money deposited was simply the private property of Shands, if the Savings Association held it for him personally, and could at any time have been exonerated by paying it to him, and had no right to pay it to any one else, then the State had no specific

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Harrison v. Phillips.

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interest in it, nor did the sureties therein derive any, and the interest they or any of them might subsequently acquire possesses the same character and attaches the same obligation as though acquired in any other property.

We will, then, first inquire whether, if one of several sureties, after the settlement and liquidation of the claim, and the payment of his proportionate share, shall, upon his own motion and without the aid or co-operation of his co-sureties, procure by attachment or otherwise a reimbursement out of the property of the principal, he is bound to share such reimbursement with the co-sureties.

After the default is satisfied by the payment by each surety of his proportionate share, it is well settled that their claims upon the principal become thereby several and not joint ones. (Gould v. Gould, 8 Cow. 168.) After the debt is thus paid, each surety becomes an independent creditor, and stands in the same relation to the principal and to his co-securities as any other independent creditor would stand in to a common debtor and other creditors, if their equities were equal. It is not pretended that in the latter case, if the creditor should succeed in collecting his debt, the other creditors would have any claim whatever upon the fund; and if not, upon what principle can co-sureties, whose claim has thus become several, demand an interest in what one of them may be able to collect of his debtor?

Upon this subject the Supreme Court of New Hampshire uses the following language: "It is a well-settled general rule that the demands of sureties against the principal, for money paid by them severally, are in their nature several, and that they can not join in a suit against the principal. (Brand v. Boalcott, 3 B. & P. 235; Pearson v. Parker, 3 N. H. 366.) On what ground, then, can a surety claim any portion of what a co-surety has received in satisfaction of his separate claim? We think there is no ground on which such a claim can be sustained." (Messer v. Swan, 4 N. H. 488.)

As to the separate rights of general creditors, it was held in Bruce v. Vogel, 38 Mo. 100, and such is the settled law, that even when they had judgment liens of even date upon the same



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Harrison v. Phillips.

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property, thus giving them a specific claim upon it, the creditor who first sued out execution and levied upon the property was entitled to the preference.

The question now under consideration has nothing to do with the admitted obligation of each surety to apply to the benefit of all any security or fund belonging to the principal, which he may hold or have held previous to the payment of the obligation, but only concerns subsequent individual recoveries.

The plaintiff, then, has no claim upon defendant merely because of their relation as co-sureties, and we have only to inquire whether the State had any such interest in the money garnished as would give the sureties any equitable rights under the doctrine of subrogation.

The deposit account was kept in the name of "E. W. Shands, collector." It embraced his official collections only, no private funds being mixed with it. If the money, as fast as collected, belonged to the State and county, no difficulty arises in consequence of its deposit and from the fact that the specific currency became mixed with that of the institution. The claim of the State and county follows the fund and fastens upon the account created by it. There might, in some cases, be a difficulty in determining the relative rights of the State and county, but it seems to be implied, in the agreed statement of facts, that this deposit consisted of State funds only. There was but one bond. No defalcation to the county is spoken of, and I assume that none existed. The share, then, of the collections belonging to the county had been paid over, leaving the money in dispute as collected for the State alone.

I can not entertain a doubt as to the main proposition, that collections by a public officer, from the moment they come into his hands, become the property of the public authority for whose use they are collected. The collector is a public agent, and becomes a trustee of the fund. If it is to be considered his private property until paid over, what is to hinder a levy upon it by his private creditors? How can his sureties feel assured that he will not be forced into a forfeiture of the bond, be he ever so faithful, unless saved by his solvency or the forbearance of his

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Harrison v. Phillips.

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creditors? They may thus be forced to become guarantors to his general creditors instead of to his fidelity as collector.

It was the duty of Shands, under the act of March 27, 1861 (Sess. Acts 1863, p. 76, § 49), to make monthly deposits of his collections for the State in the Bank of the State of Missouri, to the credit of the treasurer, under penalty; and when he did this his agency ceased as to the amount deposited, and his liability would be so far canceled; yet his failure could in no manner operate to divest the State of its specific interest, and the fund could have been followed by suitable action wherever it could be found. Nor can the requirement of a bond, with the summary remedy upon default, be considered as having that effect. I can not see even its tendency in that direction. The demand of security for the faithful collection of the assessment and paying over its proceeds can in no legitimate way be construed as a yielding up by the State of its title to what is collected for its own use. It is not a sale of revenue, like a species of oriental farming, transferring it for a consideration, but simply the employment of the necessary agent, who is required to give the necessary security.

The deposit of the property of the State in the Savings Association created a right in the State to follow it up and compel the association to account for it. It became a debt to the State, and none the less so because its agent, the collector, might have discharged it by drawing out the money. The State having compelled the sureties to pay a liability which this fund, if collected, would have extinguished in part, it should in equity be treated as transferred to such sureties. Had the collector paid the State and satisfied his bond, this deposit would have become his. The same thing done by his sureties would transfer it to them.

If it be claimed that this has been adjudged to have been the property of Shands, and judicially transferred to defendant, it may be replied that this can not affect the equities of his co-sureties, not having been parties. Shands is divested of title by judgment if he had any; the State, if it still owned the fund, would not be; nor are those to whom in equity it has been transferred. Defendant obtained the fund and the title as against all

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State of Missouri ex rel. Kempf v. Boal.

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others, but upon every principle he should be held to hold it for their use as the equitable owners.

The books abound in cases that sustain the equitable assignment under consideration, but most of them arise where the principal has turned over to the creditor some specific security, of which the latter could have availed himself. The equity, however, does not arise from the voluntary act of the principal, but from the possession by the creditor of a security or fund which, in equity, ought to be appropriated to discharge the debt. If he does not so appropriate it, but compels the sureties to pay the obligation, the law turns it over to them, and in proportion to their advances. They become at once, not by contract, but upon the principles of natural justice, the equitable owners of the fund, and no superior diligence in one can despoil the others. If he collects the whole fund, he must, as in other cases, hold it as trustee for all the owners. (*McCune v. Belt*, 45 Mo. 176.) It is not as among equal judgment creditors, where the first levy gives the priority; for in that case there is no ownership, only a right; and the levy and sale became necessary to transfer the property. From a careful consideration of the facts and the law, I can see no principle that would entitle the defendant to the whole of this fund. The costs and expenses of collecting it should be allowed him, and the remainder should be divided equally among those who paid the debt.

The plaintiff was entitled below to a judgment for his proportionate share, and the judgment against him is reversed and the cause remanded for such judgment to be entered, unless some new facts shall be developed. The other judges concur.

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THE STATE OF MISSOURI *ex rel.* KEMPF, Respondent, *v.* WILLIAM BOAL, Appellant.

1. *Quo warranto* — Information — Sufficiency of interest of relator. — The enactment that informations in the nature of a *quo warranto* may be exhibited at the relation of any person desiring to present the same (*Wagn. Stat.* 1123, § 1) means any person having an interest in the subject of the prosecution. (*State ex rel. Hequembourg v. Lawrence*, 38 Mo. 535, cited and affirmed.)

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The State of Missouri ex rel. Kempf v. Boal.

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2. *Quo warranto*—*Information*—*Interest of relator*.—An information in the nature of a *quo warranto*, to decide as between two parties which has the better right to a certain office, must show affirmatively that the relator has a title to the office, if the defendant's title be defeated, and therefore must show that the relator possessed all the requisite qualifications for the office.
3. *Elections*—*Votes for candidates who have not filed the candidates' oath*.—Votes cast for a candidate who has neglected to take and file the oath of loyalty prescribed by the constitution, are nugatory. The constitution distinctly prohibits their being cast up or treated as votes all.

*Appeal from Sixth District Court.*

*Orrick & Emmons*, and *King*, for appellant.

I. This information, although exhibited by the circuit attorney, is not in the nature of a criminal proceeding, but is brought at the relation of a private person for the purpose of determining a matter of private right between two persons claiming the same office, and is therefore essentially a civil proceeding. (*State ex rel. Hequembourg v. Lawrence*, 38 Mo. 535.) And being a civil proceeding, it is not sufficient for the relator to aver that the defendant in the information might by some possibility not be entitled to hold the office in question, but he must also aver that the relator possesses all the qualifications required by law, and that he was duly elected to the office. Eligibility and election are necessary to establish title to the office. In the present case the relator has made no averment of eligibility to the office in question. He simply avers that he possessed one of the requisites; that is, that he had taken the oath of loyalty. "Relators, on application for a *quo warranto* against intruders into office claimed by relators, must show title in themselves." (*Miller v. English*, 1 N. J. 317.)

II. The enactment that writs of *quo warranto* may be issued on the suggestion of any person desiring to prosecute the same, means any person having an interest to be affected. (*Commonwealth ex rel. McLaughlin v. Cluley*, 56 Penn. St. 270.) The proceeding by information in the nature of a *quo warranto*, at the relation of a private person claiming an office, contemplates a judgment in favor of the relator as well as against the defendant, where title is shown in the relator. (*State ex rel. McCune v.*



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The State of Missouri ex rel. Kempf v. Boal.

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Ralls County Court, 45 Mo. 58.) The petition or information fails to show any title in the relator, and the demurrer, therefore, ought to have been sustained.

*Bruere & Kingsbury*, for respondent.

I. The whole scope and end of these proceedings is to ascertain by what warrant the defendant occupies the office of director in said school district, and, if that is found insufficient, to oust him. The proper incumbent, if there is one in existence, will then find the path unobstructed to the attainment of his right for the office. The relator might just as well be merely a citizen of that school township, or any person claiming any interest in the government of the public schools in that township, and laying no claim to the office in controversy. The only way in which the qualification of the relator to appear as such can be questioned is upon the application for leave to file the information. No exception was taken to the action of the Circuit Court permitting such information to be filed, nor was there a motion filed to set aside the order granting such leave. It is not a subject for demurrer, because the interest of the relator need not and rarely does appear in the information. If a suitable interest is not shown in the subject-matter, leave to file the information will be refused. (*Tancred's Quo Warranto*, 45-6; *Cole's Quo Warranto*, 172; *Hequembourg v. Lawrence*, 38 Mo. 535.)

II. Our statutes do not require that the relator must have the right to or be entitled to the office. (R. C. 1855, p. 633, §§ 1, 3; *State ex rel. Washington County v. Stone*, 25 Mo. 555.) A writ of *quo warranto* is a writ of right, and issues as a matter of course upon demand of the proper officer.

III. The petition states that said relator, Quirin Kempf, was the legally-elected school director at said election.

CURRIER, Judge, delivered the opinion of the court.

This is an information in the nature of a writ of *quo warranto*. It is brought at the relation of Kempf against the defendant, as an intruder into the office of school director for township 48, in St. Charles county. Kempf and the defendant were



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The State of Missouri ex rel. Kempf v. Boal.

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candidates for that office at the election, and the defendant, as the information shows, received a majority of the votes, Kempf being the next in vote. Kempf had taken and filed the oath of loyalty as provided by the constitution, which the defendant had neglected to do. It is therefore claimed, and justly, that the defendant was ineligible to the office and wanting in the legal prerequisites qualifying him for the discharge of the functions of a school director. But was Kempf in any better condition? The information shows that he took and filed the oath of loyalty as provided by law, but it fails to show that he possessed certain other indispensable prerequisites of eligibility, as that he was a "resident qualified voter" in the district. (Sess. Acts 1868, p. 165, § 2.) On that ground the information is demurred to as insufficient; and whether or not the information is sufficient is the question for decision.

The enactment that informations of this character may be exhibited "at the relation of any person desiring to prosecute the same," means any person having an interest in the subject of the prosecution — in this case in the office of school director. (State *ex rel.* Hequembourg v. Lawrence, 38 Mo. 535; Commonwealth *ex rel.* McLaughlin v. Cluley, 56 Penn. St. 270.) What interest had the relator in that office? The information fails to show that he had any. It states that he received a minority of the votes, and filed the required oath, and there stops, so far as any attempt is made to set out his qualifications for the office is concerned. But it was necessary, in order to show title to the office in him, that it should further appear that he was a resident qualified voter in the district — that is, that he resided in the district; that he had resided in the State one year; and that he had registered, and thereby become a qualified voter. It was as necessary to show these facts as to show that he had taken the oath of loyalty. But there is no allegation, general or special, in the information averring eligibility or qualification for the office, except as to the question of loyalty. For aught the information discloses, the relator may have been a resident of some other State, and so disqualified from holding the office. If disqualified in consequence of non-residence or other cause, he had no legal title

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 Kimm v. Weippert et al.
 

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to the office, and consequently no interest therein. The information might be well enough after verdict or judgment, but the question here arises upon demurrer, and the objection must be sustained.

As regards the votes cast for the defendant, they were nugatory. It was as though no such votes had been cast at the election. The constitution distinctly prohibited their being cast up or treated as votes at all, as it also prohibited the issuing of a certificate of election because of them. The evident intention of the constitution is that the party receiving the majority of available votes should have the certificate of election; that is, the majority of votes that it was permissible for the canvassers to "cast up."

The judgment will be reversed and the cause remanded. The other judges concur.

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**THEODORE KIMM, Plaintiff in Error, v. JOHN WEIPPERT AND ELIZA WEIPPERT, HIS WIFE, Defendants in Error.**

1. *Husband and wife—Separate property of wife—Particular mode of disposition will not preclude her from adopting another mode, when.—A femme covert* is absolutely a *femme sole* with respect to her separate estate when she is not specially restrained, by the instrument under which she acts, to some particular mode of disposition. The *jus disponendi* is incident to her separate estate, and follows it by implication. And although a particular mode of disposition is pointed out, it will not preclude her from adopting any other mode of disposition unless there are words restricting her power of disposition to the only mode pointed out.
2. *Note by married woman to create a charge on her separate estate, must show an intent to charge it, and the intent must be gathered from the contract itself.—*A note signed by a married woman, jointly with her husband, does not create a charge upon her separate estate unless a true interpretation of the contract shows an intent to render it liable. And her intent must be gathered from the contract itself, and not from extraneous parol evidence.

Thus, on the sale of certain land, a note for the purchase money, signed by the wife jointly with her husband, and secured by deed of trust, would not, on that state of facts, create a charge on the separate estate of the wife so as to render it liable for the residue of the debt in case the note was unpaid, and the land being sold under the deed of trust failed to satisfy it; and for the reason that a true interpretation of the note and deed taken together showed that the only security intended to be pledged was the property purchased.

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Kimm v. Weippert et al.

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*Error to Second District Court.*

*Pipkin & Thomas*, for plaintiff in error, cited in argument *Coates v. Robinson*, 10 Mo. 757; *Whitesides v. Cannon and Wife*, 23 Mo. 457; *Clafin v. Van Wagoner*, 32 Mo. 252; 2 Sto. Eq., §§ 1400-1; 2 Rop. Husb. & Wife, 246; *Hulme v. Tenant*, 1 Bro. C. C. 14 and note; *Jaques v. M. E. Church*, 17 Johns. 581.

*Ahloers & Williams*, for defendants in error.

I. The Circuit Court below erred manifestly in rendering judgment against Eliza Weippert upon the merits of the case. (1) She had not such a power of disposition over her separate property as to empower her to create charges on the same by the execution of promissory notes. It requires the general and absolute power to dispose of her separate estate to enable a married woman to charge debts by promissory notes upon the same. (Sto. Eq. Jur., §§ 1397, 1399.) The lot 3 being conveyed to Eliza during marriage, without trustees, and the power of disposition being presented in the deed, she can not convey the same or make charges thereon, outside of that power, for her heirs have an interest in the property. (Sto. Eq. Jur., §§ 1391-2.) (2) If Eliza Weippert had such general power by said deed, then the facts and evidence show that she did not charge the promissory notes in question upon her separate property, lot 3 in Windsor Harbor. The intention of a *femme covert* to bind her separate property for debts contracted by her must be proven, either expressly or by implication. Now, if in the first instance the intention of Eliza Weippert to charge the notes executed against the real estate be implied from the very fact of executing the same, then such *prima facie* implication is more than sufficiently rebutted and overcome by the evidence given in the case. If a married woman executes a note and does not otherwise secure it, the law may presume that she intends to charge it upon her separate property, but the presumption is only *prima facie*, and far from being conclusive; it is already, as Story says, a strong case of constructive implication by courts of equity, and the reason of the presumption is that the intention must

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Kimm v. Weippert et al.

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have been that the estate shall operate some way, and that it can have no operation except as against her separate estate. But in this case it did and could have operated, because the notes operated upon the lots the deed of trust was given on, by which they were secured. (Sto. Eq. Jur., § 1400.)

II. The instruction No. 3 asked by Kimm and given was manifestly wrong. The presumption may be rebutted by parol evidence, and such parol evidence does not vary the notes executed.

WAGNER, Judge, delivered the opinion of the court.

It will be unnecessary to notice in detail the preliminary question raised in regard to the pleadings in this case. That the petition, tested by the rules of scientific pleading, is badly drawn, is unquestionable. But, as the court disregarded that part of it which prayed judgment on the notes, and tried the cause solely on the equities, we are inclined to treat it simply as a petition in equity; and we think that justice will be subserved and the interests of the parties promoted by examining the case upon its merits. The proceeding was in the nature of a bill in equity, to subject the separate estate of the defendant Eliza to the payment of certain notes due and owing to the plaintiff.

From the record it appears that the notes were given in consideration of the purchase of certain lots sold by plaintiff in the town of Kimmswick, Jefferson county, Mo. Some of the purchase money was paid, and the notes were executed for the remainder, signed by both the defendants, they being at the time husband and wife. To secure the payment of the notes a deed of trust was made and delivered, in which both of the defendants joined; and default being made in the payments, the property was sold at trustee's sale, and not bringing enough to satisfy the amount due, this suit was brought to obtain satisfaction of the residue.

It also appears that, at the time the property was purchased from Kimm, the defendant Eliza was possessed of a lot in Windsor Harbor, as her separate estate, but that the plaintiff had no notice of that fact, and this is the property which is now sought to be proceeded against.

## Kimm v. Weippert et al.

The Circuit Court granted the relief prayed for, declared the debt a lien upon the estate, and ordered its sale for satisfaction. This decree was reversed in the District Court, upon a mere question of pleading. The deed conveying the estate to the defendant Eliza contains this clause, viz: "to have and to hold, together with all the rights, immunities, privileges, and appurtenances to the same belonging, unto the said Eliza Weippert, for her sole and separate use and benefit and behoof, separate and apart from her said husband, and for her heirs and assigns forever, with full power, by her deed duly executed and joined in by her said husband, to encumber, sell, and convey the same conditionally or absolutely. The said John Weippert shall in no event have or obtain any interest or estate in said property by virtue of this deed, but the same shall belong absolutely to the said Eliza Weippert as her own separate and individual property." It is now contended that as the deed conveying the separate estate to Mrs. Weippert provides that she may dispose of it by joining with her husband in a conveyance for that purpose, she is incapable of disposing of it in any other way; and it is further insisted that in no event is the separate estate chargeable for the debt. The deed vests in Mrs. Weippert the full, absolute, and complete title, and gives her the entire ownership, and that will be generally held to carry with it the most ample power of disposition. Some of the earlier cases decided that where a particular mode was pointed out in the deed to a married woman, by which she might convey her separate estate, she was restricted and could convey by that mode only. Chancellor Kent was of the opinion that the power of disposition of the separate estate of the wife by her is not absolute, but only *sub modo* — to the extent of the power given her by the instrument — and if the instrument points out a particular manner of disposition, then no other can be adopted, although there is no express prohibition of any other mode; and there are other authorities of the same purport: (Jacques v. M. E. Church, 3 Johns. Ch. 77; Lancaster v. Dolan, 1 Rawle, 231; Thomas v. Farwell, 2 Whart. 11; Morgan v. Elam, 4 Yerg. 375; Rogers v. Smith, 4 Penn. 93.) But the later, better, and prevailing opinion is, that a *femme covert* is absolutely a *femme*



*sole* with respect to her separate estate, when she is not specially restrained, by the instrument under which she acts, to some particular mode of disposition; and although a particular mode of disposition is pointed out, it will not preclude her from adopting any other mode of disposition, unless there are words restraining her power of disposition to the very mode pointed out. (Jacques v. M. E. Church, on appeal, 17 Johns. 548; Vizonneau v. Pegram, 2 Leigh, 183; West v. West, 3 Rand. 373; Whitaker v. Blair, 3 J. J. Marsh. 239; Strong v. Skinner, 4 Barb. 546-53; Machir v. Burroughs, 14 Ohio St. 519; Leaycraft v. Hedden, 3 Green's Ch. 512.) When the leading case of Jacques v. M. E. Church, *supra*, was in the Court of Errors, where all the law judges concurred in reversing the judgment of the chancellor, Spencer, C. J., declared that the decisions fully established, "that a *femme covert*, with respect to her separate estate, is to be regarded in a court of equity as a *femme sole*, and may dispose of her property without the consent or concurrence of her trustee, unless she is specially restrained by the instrument under which she acquires her separate estate;" and "that the established rule in equity is, that when a *femme covert*, having separate property, enters into an agreement, and sufficiently indicates her intention to effect it by her separate estate, a court of equity will apply it to the satisfaction of such an engagement." And Platt, J., considered the rule to be "that a *femme covert*, having a separate estate, is to be regarded as a *femme sole* as to her right of contracting for and disposing of it. The *jus disponendi* is incident to her separate property, and follows, of course, by implication. She may give it to whom she pleases, or charge it with the debts of her husband, provided no undue influence be exerted over her; and her disposition of it will be sanctioned and enforced by a court of equity without the assent of her trustee, unless that assent be expressly made necessary by the instrument creating the trust. And the specification of any particular mode of exercising her disposing power does not deprive her of any other mode of using that right, not expressly or by necessary construction negatived in the devise or deed of settlement." In the instrument we are now considering there is no restriction or lim-

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Kimm v. Weippert et al.

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itation. There are affirmative words showing that the wife may convey by joining with her husband, but there is nothing to indicate that it was intended that she should be restrained to that particular mode. As the absolute title was cast upon her, the *jus disponendi* accompanied it; and in the absence of negative words limiting her power in regard to the manner and means to effect a charge or disposition, I am of the opinion that it was entirely competent for her to encumber or sell in any way she saw proper. Did her signing the notes in connection with her husband evince an intent to charge her separate estate? The ruling of this court has been that, where a married woman executed a promissory note jointly with her husband, although it did not appear on what account the note was executed—whether for the benefit of the wife or of the husband, or for their joint benefit—equity would subject real estate held to the separate use of the wife to the payment thereof, and would decree a sale of the same. (Whitesides v. Cannon, 23 Mo. 457; Coates v. Robinson, 10 Mo. 757; Claflin v. Van Wagoner, 32 Mo. 252; Schafroth v. Ambs, *ante*, p. 114.) In Whitesides v. Cannon, Judge Leonard, in delivering the opinion of the court, although professing to follow strictly the case of Coates v. Robinson, entered into a very elaborate discussion of the question and a thorough review of the English cases. That the conclusion which he deduced is amply sustained by the English equity authorities, is undeniable, and yet it must be admitted that it rests on no very satisfactory foundation, and that the best considered American cases have greatly changed and modified it. The whole doctrine of proceeding against the separate estates of married women is the creature of equity, and was resorted to to prevent injustice. The separate estate was a provision for the wife's separate use and benefit, independent of her husband, in which he had no interest, over which he had no right of control. She could not, at common law, hold the legal title to property, either personal or real, for the reason that during her state of coverture she and her husband were considered one person, and her identity, so far at least as the right to hold was involved, was lost or merged in him. There was, therefore, no way at law in which

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Kimm v. Weippert et al.

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such separate estate of the wife could be reached to satisfy the demands upon it, however equitable and just, and although they may have been created by her for her individual benefit and upon the credit of her separate estate. (2 Sto. Eq. Jur., §§ 1366-8.)

To prevent the great injustice which might otherwise arise, and inasmuch as the wife's creditors had not the means at common law of compelling payment of her debts which she contracted to pay out of her separate estate, courts of equity undertook to give effect to them—not as personal liabilities, but by laying hold of the separate property as the only means by which they could be satisfied. (2 Spence's Eq. Jurisdic. 324.) Grave doubts were for a while entertained whether the wife could dispose of the property without special authority conferred by the instrument conveying it to her, but it was finally decided that she could, on the ground that the right of disposal was a necessary incident to the right of property. It is undoubted that this universal *jus disponendi* was the exclusive and only foundation for the right in question. Lord Thurlow, in the case of Fettiplace v. Gorges (3 Bro. C. C. 8), places the right upon this ground, and I am not aware that any other basis has ever been suggested for it. Assuming, then, this to be the foundation, would not reason dictate that the wife, to avail herself of it, should make some disposition of the specific property itself, or by some act clearly indicate an intention to charge it and render it liable? Yet the Master of the Rolls, in Norton v. Turvill, 2 Pr. Wms. 144, and in Standford v. Marshall, 2 Atk. 69, held the separate estate of a married woman liable for the payment of her bond, although the bond in no way referred to her separate estate, and in the latter case was given for money lent to her husband. Lord Chancellor Thurlow followed these cases, and the reasoning in support of them seems to be this: that it being the rule in equity that a wife who had a separate estate might deal with such estate in the same manner as if she were sole, it followed that such estate was liable for her engagements in the same manner as it would be if she were a *femme sole*. The equitable rule, which, being founded in the right of the wife to dispose of her property, went no further than to allow

her to make contracts specifically appropriating or charging her separate estate, was thus extended so as to enable her to contract generally, without in any manner referring to such estate.

The doctrine was severely characterized by Chancellor Kent in *The M. E. Church v. Jacques*, 3 Johns. Ch. 77. In his admirable criticism of the English cases, where, speaking among others of the authorities above referred to, he says: "It is difficult to perceive upon what reasoning or doctrine the bond or parol promise of a *femme covert* could for a moment be deemed valid. She is incapable of contracting, according to the common right mentioned by Lord Macclesfield; and if investing her with separate property gives her the capacity of a *femme sole*, it is only when she is directly dealing with that very property. The cases do not pretend to give her any of the rights of a *femme sole* in any other view or for any other purpose." But though, as above intimated, Lord Thurlow followed the cases before cited, he seems to have been dissatisfied with the reasoning on which they were based; and in *Hulme v. Tenant*, 1 Bro. C. C. 16, which is regarded as the leading case on the subject, where the separate estate of a wife was held liable for the payment of her bond given for money borrowed, part of which had been borrowed by her husband and the residue by herself, he uses this language: "I take it, therefore, it is impossible to say but that a *femme covert* is competent to act as a *femme sole* with respect to her separate property when settled to her separate use; but the question here goes a little beyond that. It is not only how far she may act on her separate property; I have no doubt about that; but the question is, how far her general personal engagements shall be executed out of her separate property." Although he clearly pointed out the distinction as to the liability of the separate estate, he yielded to the previous cases, and held the estate chargeable. He further adds: "I have no doubt about this principle, that if a court of equity says a *femme covert* may have a separate estate, the court will bind her to the whole extent as to making the estate liable to her own engagements, as, for instance, for payment of debts," etc.

Lord Eldon repeatedly expressed his disapprobation of the

decision in *Hulme v. Tenant*, but, according to his accustomed habit of always doubting but never overturning judgments, he followed the rule therein laid down. But afterward, in the case of *Bolton v. Williams*, 2 Ves. 138, Lord Chancellor Loughborough rejected the reasoning of Thurlow as unsound, and denied the liability of a married woman's separate estate for her general parol engagements, and explained the previous cases upon the ground that the securities which the wife had executed operated as appointments of her separate property; that is, as appropriations or pledges of such property for the payment of the debt for which the security was given. This new doctrine, that a written security was an appointment, rested on no substantial foundation, and was plainly erroneous, and proceeded upon the assumption that the wife's separate estate was not liable for general engagements, but only such as were specifically charged upon it, and yet held that it was liable for a bond or note which in no manner referred to it. This theory, that a written security was an appointment and a charge, while it was otherwise with a mere parol promise, was maintained unchanged from the time of its introduction by Lord Loughborough, in *Bolton v. Williams*, until the case of *Murray v. Barlee*, 3 M. & K. 209, when Lord Brougham rejected the distinction between a written security and a promise by parol, and extended the rule so as to make the parol engagement of the wife a charge as well as her bond or note.

"In all these cases," says the Lord Chancellor, at page 223, "I take the foundation of the doctrine to be this: the wife has a separate estate, subject to her own control and exempt from all other interference or authority. If she can not affect it, no one can; and the very object of the settlement which vests it in her exclusively is to enable her to deal with it as if she were discoverer. The power to affect it being unquestionable, the only doubt that can arise is whether or not she has validly encumbered it. At first the court seems to have supposed that nothing could touch it but some real charge, as a mortgage or an instrument amounting to an execution of a power, where that view was supported by the nature of a settlement, but afterward was more guarded, and the court only required to be satisfied that she intended to deal with



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Kimm v. Weippert et al.

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her separate property. When she appeared to have done so, the court held her to have charged it, and made the trustees answer the demand thus created against it. A good deal of the nicety that attends the doctrine of powers thus came to be imported into the consideration of the subject. If the wife did any act directly charging the separate estate, no doubt could exist, just as an instrument expressed to be in execution of a power was always, of course, considered as made in execution of it. But so, if by any reference to the estate it could be gathered that such was her intent, the same conclusion followed. Thus, if she only executed a bond, or made a note, or accepted a bill, because those acts would have been nugatory if done by a *femme covert* without any reference to her separate estate, it was held, in the cases I have above cited, that she must be intended to have designed a charge on that estate, since in no other way could the instrument thus made by her have any validity or operation; in the same manner as an instrument, which can mean nothing if it means not to execute a power, has been held to be made in execution of that power, though no direct reference is made to the power. Such is the principle. \* \* \* But doubts have been in one or two instances expressed as to the effect of any dealing whereby a general engagement only is raised; that is, where she becomes indebted without executing any written instrument at all. I own I can perceive no reason for drawing any such distinction. If, in respect of her separate estate, the wife is in equity taken as a *femme sole*, and can charge it by instruments absolutely void at law, can there be any reason for holding that her liability, or, more properly, her power of affecting the separate estate, shall only be exercised by a written instrument? Are we entitled to invent a rule, to add a new chapter to the statute of frauds, and to require writing where the act requires none? Is there any equity reaching written dealings with the property, which extends not also to dealings in other ways, as by sale and delivery of goods? Shall necessary supplies for her maintenance not touch the estate, and yet money furnished to squander away at play be a charge on it, if fortified by a scrap of writing? No such distinction can be taken upon any conceivable principle."

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Kimm v. Weippert et al.

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But the reasoning of Lord Brougham, in *Murray v. Barlee*, has been since overthrown, and it constitutes no longer the doctrine of the English courts. In the case of *Owens v. Dickinson*, 1 Craig & Ph. 58, Lord Chancellor Cottenham combated the assumption that because a married woman has executed a bond or note, or contracted a debt in any other form, therefore she must have intended to charge such debt upon her separate estate. He shows that if the doctrine is sound, then every debt must become a specific lien upon the separate estate, to be paid in the order of its priority, while Lord Brougham held that such debts are all to be paid *pari passu*. He then proceeds to prove that a contract which is entirely silent as to the separate estate, and makes no reference to its existence, can not, by any legal reasoning, be shown to have been intended as a disposition of such estate. He says: "It would have been operative upon the *femme covert's* separate estate, but not by way of the execution of a power, although that has been an expression sometimes used, and, as I apprehend, very inaccurately used, in cases where the court has enforced the contracts of married women against their separate estates. It can not be an execution of the power, because it neither refers to the power nor to the subject-matter of the power; nor, indeed, in any of the cases, has there been any power existing at all. Besides, it was argued in *Murray v. Barlee*, if a married woman enters into several engagements of this sort, and all the parties come to have satisfaction out of her separate estate, they are paid *pari passu*; whereas, if the instruments took effect as appointments under a power, they would rank according to the priorities of their dates. It is quite clear, therefore, that there is nothing in such a transaction which has any resemblance to the execution of a power. What it is, it is not easy to define. It has sometimes been treated as a disposing of the particular estate, but the contract is silent as to the separate estate; for a promissory note is merely a contract to pay, not saying out of what it is to be paid, or by what means it is to be paid; and it is not correct, according to legal principles, to say that a contract to pay is to be construed into a contract to pay out of a particular property, so as to constitute a lien upon that property.

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Kimm v. Weippert et al.

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Equity lays hold of the separate property, but not by virtue of anything expressed in the contract; and it is not very consistent with correct principles to add to the contract that which the party has not thought fit to introduce into it."

The view taken of the matter by Lord Thurlow, in *Hulme v. Tenant*, is more correct. According to that view, the separate property of a married woman being a creature of equity, it follows that if she has a "power to deal with it, she has the other power incident to property in general, namely: the power of contracting debts to be paid out of it; and inasmuch as her creditors have not the means at law of compelling payment of those debts, a court of equity takes upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property as the only means by which they can be satisfied."

Lord Cottenham here does not go back to the doctrine of Thurlow, but attempts to support the established rule by an entirely new process of reasoning. It will be thus seen that while the English chancellors have steadily adhered to the principle, hardly any two of them agreed upon any common ground by which it can be supported. The views of Lord Cottenham will prevail till some subsequent chancellor shall detect in them some fallacy, and what reasoning he will resort to in support of the cases it is impossible to foretell. It seems that a rule which has to be constantly upheld by inharmonious, floating, and contradictory reasons can not rest on any very fixed or satisfactory basis. The latitude of construction which the courts of England have maintained is calculated to elude and defeat the very object for vesting separate property in married women. In the majority of cases the property is given to her "to protect her weakness against her husband's power, and her maintenance against his dissipation." But if the mere fact of her signing a promissory note, not for her own benefit, is to be held as an appropriation or a ground for subjecting her estate to payment, the protection is an illusion. The Supreme Court in Massachusetts, after a very able discussion of the subject, come to the following conclusion: "And we think," the court says, "upon mature and full consideration, that the whole doctrine of the liability of her separate

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Kimm v. Weippert et al.

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estate to discharge her general engagements rests upon grounds which are artificial, and which depend upon implications too subtle and refined. The true limitations upon the authority of a court of equity in relation to the subject are stated with great clearness and precision in the elaborate and well-reasoned opinions of the Court of Appeals in New York, in the case of *Yale v. Dederer*; and our conclusion is that when, by the contract, the debt is made expressly a charge upon the separate estate, or is expressly contracted upon its credit, or when the consideration goes to the benefit of such estate, or to enhance its value, then equity will decree that it shall be paid from such estate or its income to the extent to which the power of disposal of the married woman may go. But when she is a mere surety, or makes the contract for the accommodation of another, without consideration received by her, the contract being void at law, equity will not enforce it against her estate, unless an express instrument makes the debt a charge upon it." (*Willard v. Eastham*, 15 Gray, 328, per Hoar, J.) And it is the express doctrine of the best-reasoned authorities that to render the separate estate of a married woman liable, the debt must be contracted either for the benefit of the separate estate or for her own benefit, upon the credit of the separate estate, or where in the instrument executed by her she makes a specific charge upon her estate. (*Jacques v. M. E. Church*, 17 Johns. 548; *Willard v. Eastham*, *supra*; *Gardner v. Gardner*, 7 Paige, 112; 22 Wend. 528; *Curtis v. Engel*, 2 Sandf. Ch. 287; *Dyett v. North American Coal Co.*, 20 Wend. 570; *Knowles v. McKamly*, 10 Paige, 343; *Yale v. Dederer*, 48 N. Y. 265; 22 N. Y. 450; *Todd v. Lee*, 15 Wis. 365.)

It is not a question as to the wife's power to charge her separate estate, for that is conceded, but it rests essentially upon the manner and purpose. It is to be regretted that the attention of Judge Leonard was not particularly called to the reasons of the rule, and the qualifications above suggested, when he reviewed the cases in *Whitesides v. Cannon*. The case of *Coates v. Robinson*, 10 Mo. 757, is entirely consistent with the limitations in the authorities above referred to. There, Mrs. Coates was possessed

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Kimm v. Weippert et al.

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of a separate estate, and she purchased of Johnson a tract of land for which she and her husband gave their promissory notes. The title bond was executed to her, and the land was to be deeded to her on the payment of the purchase money. Here was a contract in which she was wholly interested, for her personal benefit, in which she received the consideration, and for the payment of which her separate estate was of course liable. It is true, Judge Napton, in delivering the opinion of the court, did not advert to this distinction, but placed the decision upon the broad ground advanced by the English courts, though the facts of the case did not require the enunciation of the rule to that extent. And Judge Leonard, following the case implicitly, re-states the doctrine in its fullest latitude. Without undertaking to unsettle any law, or overrule any case decided in this court, I have felt constrained to express my dissatisfaction with the extent to which the doctrine has been carried. But, admitting that we are bound by the prior decisions, does this case show that Mrs. Weippert intended to charge her separate property? The law, in its utmost rigor, places the charge or liability on the ground that signing a note evinces an intent to make the separate estate liable, otherwise the transaction would be nugatory. The undertaking is wholly implied. Judge Story, while conceding the position with evident hesitation, cautiously adds that it furnishes "a strong case of constructive implication, founded more upon a desire to do justice than upon any satisfactory reasoning." (2 Sto. Eq. Jur., § 1400.)

Mrs. Weippert was introduced as a witness, and testified, against the objections of the plaintiff, that at the time she signed the notes and joined in the execution of the deed of trust, she had no intention of binding her separate estate; and the plaintiff then offered himself as a witness and stated that at the time the contract was entered into and the papers drawn he did not know that Mrs. Weippert owned any separate property. This evidence should have been excluded. The intention could not be proved by extraneous evidence *dehors* the contract, but must be inferred from, and therefore is embraced in, or manifested by, the contract itself. No court has ever held or intimated that parol evi-



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Jamison, Ex'r of Bell, v. Hay et al.

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dence was admissible to prove that the bond or note of a *femme covert* was intended to be a charge upon her estate. To permit this would be in direct conflict with the rule which excludes parol evidence offered to explain a written instrument. (Selden, J., in *Yale v. Dederer*, 22 N. Y. 456.) The very point was decided by the court in Kentucky, where it was held that the declaration of a married woman at the time she signed the note, that her separate property should not go for the purpose of its payment, was properly excluded. (7 B. Monr. 293.) The intent, to be of any importance, must be a part of the contract; that is, the true meaning of the contract, when justly interpreted, must be that the debt which it creates should be a charge upon the estate. We are, then, to arrive at our conclusion by throwing out of view entirely the parol testimony and deciding the case upon the written instruments. A part of the purchase money was paid, the notes were made for the balance, and to secure payment a deed of trust was executed upon the whole property purchased. To my mind it is clear that this was the only security intended or thought of by the parties, and that there was no design of charging the separate property of the wife.

The judgment of the District Court, although not given for the proper reason, will be affirmed. Judge Bliss concurs. Judge Currier concurs in the result.

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WM. C. JAMISON, EXECUTOR OF WM. H. BELL, DECEASED, v.  
SUSAN J. HAY, Respondent, and ROBERT T. SHEPPARD *et al.*,  
Appellants.

1. *Wills—Legacies—Devisees mentioned by classes—Children of devisees dead at date of will, entitled, how.*—A testator devised a certain remainder of his estate "to the sons and daughters of A." At the date of the will some were dead and some living. *Held*, that although the testator was partially aware of this fact, yet, inasmuch as their deaths were in no manner alluded to in the will, and they were therein regarded as alive, and as all the circumstances attending the making of that instrument showed its object to be that the children of those deceased should share his bounty, therefore, under the statute (Wagn. Stat. 1386, § 11), the children of A. who were living at the

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Jamison, Ex'r of Bell, v. Hay et al.

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date of the will were not entitled to the whole of said residue as survivors, but the descendants of A.'s other children were entitled to the share which their ancestors, if living, would have taken.

The statute contemplates that where an estate is devised to children and relatives, if part of them are dead and part living, the children of those dead shall take the place of their deceased parents.

At common law the rule is different. Thus, if the property be given simply to the children of A., to be equally divided between them, the entire subject of the gift will vest in any child surviving the testator, without regard to previous deaths; and the rule is the same when the gift is to the children of a person actually dead at the date of the will.

*Appeal from St. Louis Circuit Court.*

*Mumford, and Garesche & Mead*, for the grandchildren,  
appellants.

I. The decisions at common law, relied on, are founded on a principle of lapsed and void legacies, which has been radically changed by our statute. (Gen. Stat. 1865, p. 528, § 11.) The will itself recognizes the relationship referred to in the statute, for the devise is to the sons and daughters of "my uncle," Col. Sheppard. Gen. Stat. 1865, p. 532, § 49, re-enacts the common law, and provides "that the courts, in the construction of last wills, shall have due regard to the directions of the will, and the true intent and meaning of the testator, in all matters brought before them." The design of the executor was one of benevolence and of charity. Can any one believe that the testator intended that Mrs. Hay, because by chance sole survivor of her brothers and sisters, should receive from the testator the same share as he had given to his own sister, and this when the nephews and nieces of Mrs. Hay got nothing?

II. If Mrs. Hay was to take the whole bequest if she alone survived the testator, words of survivorship should have been inserted to exclude the operation of the clause of the statute referred to. This clause refers to the will of a father, grandfather, or other relative, and places all three of these classes on the same footing. The rule of construction is to be precisely the same as if it were the case of the will of a father to his children. Would any court construe a similar bequest to "my sons and daughters," to mean to the son or daughter who should by chance

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Jamison, Ex'r of Bell, v. Hay et al.

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survive him, to the exclusion of his grandchildren? Such a construction would defeat the whole law. (Dwarr. Stat. 632.) In *Gordon v. Guitar*, 17 Mo. 412, the bequest was to a child dead at the time of the execution of the will — a bequest at common law void — and yet it was held that her children took the portion thus devised. (*Smith's Case*, 2 Dess., S. C., 123; *Hamilton's Ex'r v. Lewis*, 13 Mo. 188.)

*A. Hamilton*, for respondent.

I. There is nothing on the face of the will from which to infer that the testator intended to use the words "sons and daughters" in any other than their proper legal sense. These words do not in themselves embrace the grandchildren of William Sheppard or their descendants. (*Radcliffe v. Buckley*, 10 Ves. 105; *Tier v. Pennell*, 1 Edw. Ch. 354; 2 Redf. Wills, 336-9, 354; *Horwitz v. Norris*, 13 Wright, 218; *Sheets v. Grubbs*, 4 Metc., Ky., 339; *Churchill v. Churchill*, 2 Metc., Ky., 466; *Walker v. Williamson*, 25 Ga. 549; *Stoddard v. Nelson*, 6 DeG. M. & G. 68; *Crooks v. Whitby*, 7 DeG. M. & G. 490; *Izard v. Izard*, 2 Dess. 308; *Relf v. Rutherford*, 1 Bailey, 7; *Elliott v. Elliott*, 12 Sim. 235; *Ballard v. Ballard*, 18 Pick. 41.) The word "son" is never taken for "grandson," any more than "child" is taken for "grandchild" (*Stead v. Burrier*, Raym. 411, cited in *Jackson v. Staats*, 11 Johns. 350); "daughter," therefore, does not mean "granddaughter."

II. The case is not within our statute (Gen. Stat. 1865, p. 1569, § 12). This enactment was not intended to determine who should be the primary objects of a testator's bounty, to create estates where none had been devised, or to impart validity to devises originally void. The single design of the Legislature was to prevent a lapse. The statute contemplates that the will shall name, designate, or ascertain the particular person who is intended to take as devisee, and provides that if "said devisee" (so determinately ascertained by the will) shall die before the testator, then his lineal descendants shall be substituted in place of such deceased devisee, and shall take the same estate that such devisee would have taken if he had survived the testator. But

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Jamison, Ex'r of Bell, v. Hay et al.

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here the devise was to the sons and daughters of Col. Sheppard as a class, and not *nominatim* as individuals. Under such a devise, only those of the class who answered the description at the death of the testator were devisees. Such of the sons and daughters of Col. Sheppard as were dead when the will was made were never devisees or legatees. The gift was then, in effect, to Mrs. Hay of the entirety, for she only answered the description. Such is the rule peculiar to classes, and it is founded upon a presumed intent of the testator. When giving to a class, he looks to the contingency of fluctuations, to the possible increase or diminution in the number of those who he designs shall take; and by describing the objects of his bounty as a class, rather than *nominatim* as individuals, he manifests an intent that none shall be benefited by the gift but those who may belong to the class when the gift shall take effect. (1 Jarm. Wills, 295-6; Doe v. Sheffield, 13 East, 526; Viner v. Francis, 3 Bro. C. C. 658; Downing v. Marshall, 23 N. Y. Appeals, 366, 373, 374; Barber v. Barber, 3 Myl. & Cr. 697; Shuttleworth v. Graves, 4 Myl. & Cr. 38.) For further illustration of the difference between a naming or ascertaining of particular persons as devisees (*personæ designatæ*) and the designating of a class merely, see the following authorities: Connor v. Johnson, 2 Hill's Ch. 41; Lee v. Paine, 4 Hare, 251; Stires v. Van Rensselaer, 2 Bradf. 172; Cureton v. Massey, 13 Rich. Eq. 104; Mebane v. Womack, 2 Jones' Eq. 293; Satterfield v. Mayes, 11 Humph. 58-9; Beasley v. Jenkins, 2 Head, 199; 1 Redf. Wills, 386; 2 Redf. Wills, 505; Alexander v. Walch, 3 Head, 493; 1 Jarm. Wills, 313. It necessarily follows that our statute is inapplicable. The purpose of all such statutes is undoubtedly to prevent a lapse, and where no lapse would occur if the statute had no existence there is no room for its interposition. Similar statutes have been enacted in most of the States as well as in England, but none of them have ever been otherwise applied, or been supposed to work a substitution of devisees or legatees in any case where, without it, there would be no lapse. Of course they are inapplicable to devises to a class, when at the death of the testator there is any member of the class living to take, because



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Jamison, Ex'r of Bell, v. Hay et al.

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there is no lapse to provide against, because none of the class who died before the time fixed for vesting are devisees; and because, therefore, if the children of deceased members of the class can take, they must take in opposition to the will. This is well stated in 1 Jarman on Wills, 313. In *Billingsley v. Tongue*, 9 Md. 575, where the devisee, who was specially named, was dead before the date of the will, under the statute (act of 1810, ch. 34, § 4) — “no devise shall lapse, or fail of taking effect, by reason of the death of the devisee in the lifetime of the testator” — it was held to be a void, and not a lapsed, legacy; that “if he died after the will was made and before the testator” it was a case of lapse, but “if he died before the date of the will” the legacy was void from the beginning. The case of *Sheets v. Grubbs*, 4 Metc. 339, completely covers our case and sustains the views we have taken. It was a devise “to the children of my sister M. B.” Mrs. M., one of the children, was dead before the date of the will, leaving one child, the plaintiff. The aid of the statutes was invoked. *Held*, notwithstanding its peculiar provisions, that Mrs. M. was not embraced in the devise, and was therefore not a devisee under the will. It was said that the devise was to those children who were living at the date of the will, and not to those who were dead; that any presumption that the testator intended to give an estate to persons he knew were not in existence, was “altogether inadmissible,” and that “if the devise had been to the children by name, or to the ten children of M. B., the issue of such as may have been dead at the making of the will would have taken under the statute.” See also *Dazey v. Killam*, 1 Duv. 404, and *Dunlap v. Shreve*, 2 Duv. 334, 342; *Grose's Estate*, 10 Barr, 360; *Jackson v. Roberts*, 14 Gray, 550; *Young v. Robertson*, 11 Gill & Johns. 328; *Craycraft v. Craycraft*, 6 Har. & J. 54. The case of *Guitar v. Gordon*, 17 Mo. 408, relied on by the other side, has nothing in common with this; there is an utter want of analogy between the two cases. That was a proceeding by the grandchildren of David Gordon “to have an intestacy declared upon the ground that they were not provided for or named in his will;” and it would seem that the only explanation of which the case is



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Jamison, Ex'r of Bell, v. Hay et al.

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susceptible is that the court were very clearly of the opinion that these grandchildren were provided for by the testator's will; that it was undeniably his intention that these children of Emily Guitar (his grandchildren) should take their mother's share; in other words, that by fair construction and intendment, the children themselves were the original devisees; and if so, they took directly under the will itself, and not by way of substitution under the statute.

III. It is well settled that parol or extrinsic evidence is inadmissible to control the plain, unambiguous words of the will, or to prove intention *aliunde*. (Wigr. Wills, 89, 90; Gregory v. Cogwill; 19 Mo. 415; Bradley v. Bradley, 24 Mo. 315; Williams v. Carpenter, 42 Mo. 342.) But, as declared by the court below, even if this evidence were legal and competent, it would not affect the proper construction of the will; the result would be the same. This evidence only showed that the testator had neither knowledge, remembrance, nor belief as to the existence or death of any particular individuals of these children. He could not, therefore, have named them if he had wished to do so. He could only designate them as a class generally by this mode of gift, which indicated in itself this very uncertainty in his mind in regard to the individuals who might compose the class. His declaration that he "wished to give a portion of his property to his uncle Sheppard's representatives or children" fails to show an intention different from that expressed by the terms employed in the will. In Cook v. Whitby, 7 DeG. M. & G. 490, already cited, argument drawn from any "presumption that the testator knew the state of the family" was deemed "quite untenable." In Sheets v. Grubbs, 4 Metc., Ky., 339, it was said that any presumption that the testator intended to give an estate to persons he knew were not in existence, was "altogether inadmissible." And in Doe v. Sheffield, 13 East, 256, Bayley, J., remarked: "I do not see how the want of knowledge of the testator of the death of the two at the time of making his will, which the argument for the plaintiff supposes to have been the fact, should prejudice the sister who alone survived at that time."

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Jamison, Ex'r of Bell, v. Hay et al.

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WAGNER, Judge, delivered the opinion of the court.

William H. Bell, the testator, died about the 20th day of December, 1865, without issue and unmarried, seized and possessed of both real estate and personal property. By his will, after the bequest of a number of pecuniary legacies, he proceeded to dispose of the residue of his estate to various persons in certain specified portions. By the tenth clause he devises the one undivided eighth of said residue as follows:

10. "It is my will and desire, and I hereby give, devise, and bequeath unto the sons and daughters of my deceased uncle, William Sheppard (Col.), one undivided eighth of said balance of my estate of every nature and kind whatsoever."

Col. William Sheppard died in 1822, in North Carolina, where he had always resided, leaving eight children, three sons and five daughters. All of these children, with the exception of Susan J. Hay, the defendant, were dead at the making of the will, and, with one exception, all left children. Col. Sheppard was the benefactor and friend of the testator in his early life, and, on the trial, evidence was adduced showing that all the sons and daughters named in the will were known to the testator to be dead, save two, besides the defendant. The testator, at the time of preparing the notes for the drafting of his will, said that he wished to give a portion of his property to his uncle Sheppard's representatives or children.

The special term of the Circuit Court, in its construction of the will, decided that the defendant, Susan J. Hay, was not entitled to the whole of the share provided for in the tenth clause, as survivor, but that the other defendants, the descendants of the children of William Sheppard, were entitled to take the share which their ancestors, if living, would be entitled to. On appeal, the general term reversed this decision, and adjudged and declared that the said Susan J. Hay was entitled to the whole of the share.

The rule is undoubtedly established as a principle of common-law construction, that a devise to a class of persons takes effect in favor of those who constitute the class at the death of the testa-

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Jamison, Ex'r of Bell, v. Hay et al.

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tor, unless a contrary intent can be inferred from some particular language of the will, or from such extrinsic facts as may be entitled to consideration in construing its provisions. In other words, where a bequest or devise is made to a class of persons subject to fluctuation by increase or diminution of its number, in consequence of future births or deaths, and the time of payment or distribution of the fund is fixed at a subsequent period, the entire interest vests in such persons only as at that time fall within the description of persons constituting such class. Jarman, in his work on wills, speaking of this subject, says: "Where, however, the devise or bequest embraces a fluctuating class of persons who, by the rules of construction, are to be ascertained at the death of the testator, or at a subsequent period, the decease of any such persons during the testator's life will occasion no lapse or hiatus in the disposition, even though the devisees or legatees are made tenants in common; since members of the class antecedently dying are not actual objects of gift. Thus, if property be given simply to the children, or to the brothers or sisters of A., equally to be divided between them, the entire subject of gift will vest in any one child, brother or sister, or any larger number of these objects surviving the testator, without regard to previous deaths; and the rule is the same where the gift is to the children of a person actually dead at the date of the will, in which case, it is to be observed, there is this peculiarity: that the class is susceptible of fluctuation only by diminution and not by increase, the possibility of any addition by future births being precluded by the death of the parent." (Jarm. Wills, 295-6.)

But this doctrine concerning legacies given to classes of persons rests on the intention of the testator as manifested by his will—his intention in this, as in all other cases, if it be not repugnant to law, being the guide of courts in the construction of a will. Conceding the rule established by the authorities to be as above stated, the question is whether, by our statute, and the circumstances connected with this will, the descendants of the deceased sons and daughters of Col. Sheppard are not entitled to take a proportionate part.

The statute concerning wills provides that "when any estate

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Jamison, Ex'r of Bell, v. Hey et al.

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shall be devised to any child, grandchild, or other relative of the testator, and such devisee shall die before the testator, leaving lineal descendants, such descendants shall take the estate, real or personal, as such devisee would have done in case he had survived the testator." (2 Wagn. Stat. 1366, § 11.)

This section of the statute was discussed and construed in the case of *Guitar v. Gordon*, 17 Mo. 408. There the plaintiffs were the children of Emily Guitar, who was the daughter of David Gordon, the testator. Gordon had a large family of sons and daughters, all of whom survived him except Emily Guitar, and she had been dead about a year before the making of the will. The testator named all his children in the will, and gave legacies to some of them, and recited the sums he had given to the others by way of advancement. Emily Guitar was mentioned in the will as well as the other children, and, though dead at the time, no mention was made of her death, nor were her children named as provided for. The testator recited in his will that "I have heretofore given to my daughter Emily Guitar, in property, the sum of nine hundred and seven dollars, by way of advancement." After these specific devises, the testator declared: "there will then remain a large amount undisposed of, which I direct shall be distributed among all my children, share and share alike, except my son James M. Gordon," who had already been provided for. Here it will be perceived that no devise or bequest was made to Emily Guitar, except in the residuary clause of the will, and then the gift was made to the children as a class.

This court, after mature consideration, held that there was no intestacy as to Emily, for she was expressly named in the will, and that, under the section heretofore quoted, although she was named as a class and dead at the time the will was executed, her children were entitled to take the part that she would have had if living.

The statute contemplates that among children and relatives, if part of them be dead and part living, the children of those dead shall take the place of the deceased parent. The testator, Bell, though knowing some of the sons and daughters of his uncle to be dead, and not being informed as to some of the others, evi-

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Woods et al. v. Stephens.

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dently regarded them as though they were all alive. Their deaths were in no manner alluded to, and, considering all the attendant circumstances, I have no hesitation in arriving at the conclusion that his object was that the children of those deceased should share his bounty. From this conclusion it necessarily results that the judgment at general term must be reversed, and that of the special term affirmed. The other judges concur.

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WOODS & PIERCE, Respondents, v. JOHN D. STEPHENS, Appellant.

1. *Contract — Agency — Real estate broker — Variance — What will not vitiate a contract.* — A real estate broker having contracted with the owner of a farm to sell it at a specified commission, proceeded to advertise, etc., and procured a buyer and brought him to the farm. But the latter objecting to the quantity of land offered, the owner agreed to reserve a portion and sell him only the remainder, whereupon the parties repaired to the office of the broker, who drew up the papers, and did other things in aid of the vendor, and the sale was consummated. In all things connected with the sale the broker fulfilled his contract, so far as permitted by the owner. *Held*, that the sale, being of a part instead of the whole farm, under that state of facts, was not such a variance with the written contract as to prevent the broker from recovering the full amount of the commission upon the land actually sold. The change in the terms of sale, in the particular mentioned, became a part of the original contract, and could be enforced as such.

*Appeal from Fourth District Court.*

*Barrow & McMillan*, and *De France*, and *Ewing & Holliday*, for appellant, cited 26 Mo. 102, 308; 23 Mo. 328; 41 Mo. 536; 37 Mo. 104; 38 Mo. 51; 31 Mo. 165; 4 Mo. 41; 29 Md. 512, 575.

*Harrington & Cover*, for respondents, cited *Chouteau v. Goddin*, 39 Mo. 229; *Newman v. Hook*, 37 Mo. 207; *Marsh v. Richards*, 29 Mo. 99; *Helm v. Wilson*, 4 Mo. 41; *Little v. Mercer*, 9 Mo. 218; *Gen. Stat. 1865*, pp. 683-4, §§ 1-6; *Bishop v. Ransom*, 39 Mo. 416; *State v. Marshall*, 36 Mo. 400; *Bailey v. Chapman*, 41 Mo. 536; *Moses v. Bierling et al.*, 31 N. Y. 462.



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Woods et al. v. Stephens.

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BLISS, Judge, delivered the opinion of the court.

The plaintiffs were real estate brokers, and were employed by defendant to sell his farm. The authority to sell was in writing, was very minute in its description of the property, fixed the price at twenty-three dollars per acre, and closed as follows: "The above is a correct description of my property, registered with Woods & Pierce, to remain in their hands for at least ninety days, and if withdrawn after that time, it is agreed that I will give them thirty days' notice of such withdrawal in writing; and I further agree to pay said Woods & Pierce three per cent. commission for selling the same, and if sold before withdrawn from their books, as above specified, and without the interposition and assistance of said Woods & Pierce, I agree to pay one-half the commission as named above; and I further agree, in case said Woods & Pierce shall make sale of the above-described property at the price and the terms set forth, that I will make a good and valid title," etc.

Shortly afterward, one Haywood, the purchaser, came to the office of plaintiffs inquiring for land; was referred, among other tracts, to defendant's farm, was attracted by its description, and taken by one of the plaintiffs to the farm and shown over it. While there, Haywood objected to the quantity, and defendant told him he would reserve a certain forty acres, and sell him the remainder for twenty-five dollars per acre. A few days afterward, Haywood again came to the office, informed plaintiffs that he would accept defendant's offer, whereupon they sent for defendant to come to town, and the business was consummated in the office, the plaintiffs drawing the papers, etc. They now claim the three per cent. commission, amounting to \$171, which defendant refuses to pay, but offers to give them something, claiming that the property was not sold under the contract; that only a portion was sold, and that by himself, as owner, and not by the plaintiffs. The court, however, instructed the jury that the plaintiffs were entitled to their commission upon the land actually sold, and they recovered judgment.

This instruction was correct. The plaintiffs fulfilled their con-

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Berthold, Adm'r of Sarpy, v. Berthold.

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tract so far as permitted by defendant. They furnished the capital, the office, the advertising, the reputation, etc., which attracted the purchaser; they exhibited their records, which explained the character of the property, and took the purchaser to it, drew the papers, and did other things in aid of the seller; in a word, they furnished the purchaser, and the defendant would never have seen him but for them. If he had taken the whole farm at twenty-three dollars per acre, there would have been no pretense that plaintiffs did not sell it, and the whole defense is based upon the variation by the owner from the original terms.

This defense assumes one of two things: either that, by his contract with his agents, the owner was bound to sell according to the terms furnished them, and had no power to vary them, or that, by a slight variance, after they had furnished the purchaser he could defraud them of their compensation. Neither position has a show of reason. It is true he had the power to sell, himself, but even that was restrained by his agreement; for if the property was sold by him before being withdrawn from the books of plaintiffs, and without their interposition and assistance, they were to have half the stipulated commission.

The right of the plaintiffs is sustained by the general principles of law applicable to all agreements; for if there is a change or substitution in some particular, the substitution becomes a part of the original agreement, and can be enforced as such. (*Helm v. Wilson*, 4 Mo. 44; *Little v. Mercer*, 9 Mo. 216.) In regard to the law applicable to contracts like the one in suit, see *Bailey v. Chapman*, 41 Mo. 536; *Moss v. Bierling*, 31 N. Y. 462; *Kimberly v. Henderson*, 29 Md. 512.

The other judges concurring, the judgment is affirmed.

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VIRGINIA S. BERTHOLD, ADMINISTRATRIX OF JOHN R. SARPY,  
Defendant in Error, v. PIERRE A. BERTHOLD, Plaintiff in  
Error.

1. *Principal and surety — Payment by surety — Extinguishment of obligation, to what extent — Subrogation.*— A surety who pays the debt of his principal is entitled to an assignment of the instrument paid. The payment of the

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Berthold, Adm'r of Sarpy, v. Berthold.

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obligation by the surety extinguishes it so far as the creditor is concerned, but not as to any rights which the surety has acquired by its payment. It should still subsist, with its liens and priorities, to enable him to recover of the principal as well as to compel contribution by the co-sureties, or to avail himself of any securities or collaterals turned out by the principal.

So, where an obligation turned out as collateral is paid, the original instrument, so far as the condition is concerned, is paid and extinguished; but it is still alive in favor of him who has paid it, and he should be permitted to avail himself of any rights in regard to it, to which its purchase would entitle him.

*Error to St. Louis Circuit Court.*

John R. Sarpy resided in France several years next preceding his death, which occurred April 26, 1868. The defendant was the agent and attorney in fact of said Sarpy, and had possession of his assets in St. Louis, and collected rents, etc., for him, for all which he received a regular compensation. Among the assets of Sarpy in the hands of defendant was a note for \$10,000, dated May 9, 1865, payable twelve months after date. The payment of the note was extended two years, making it finally fall due May 9, 1868, at which time it was paid.

This note was indorsed by Berthold and placed with Tesson, Son & Co., bankers, for safekeeping and collection, more than a year before it fell due. While it so remained on deposit before its maturity, the defendant, Pierre A. Berthold, executed a note, as maker, for \$4,000, for the accommodation of E. P. Tesson, the senior member of the firm of Tesson, Son & Co., and Tesson discounted said \$4,000 note at the Third National Bank, depositing the \$10,000 note belonging to John R. Sarpy as collateral security, without the knowledge or consent of Berthold. The \$4,000 note was dated December 11, 1867, and became due in sixty days, that is, on February 12, 1868. On December 23, 1867, Tesson, Son & Co. failed and suspended payment, and on January 6, 1868, filed their petition in bankruptcy. In their schedule they stated the note of Berthold among their liabilities.

Sometime in April, 1868, before the \$10,000 note became due, defendant called on Tesson, Son & Co., and asked them for the Sarpy assets, notes, etc. All were surrendered except this \$10,000 note, which Tesson then informed Berthold had been

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Berthold, Adm'r of Sarpy, v. Berthold.

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deposited as collateral security for Berthold's \$4,000 note. Berthold being advised by counsel that the \$10,000 note could not be released except on payment of said \$4,000 note, went with Tesson to the Third National Bank, on May 12, 1868, after said \$10,000 note had been paid at said bank, and said Berthold received, in full payment of said \$10,000 note, said note of \$4,000, made by himself, and \$6,000 in cash.

Sarpy died, and defendant in error was appointed his administratrix. She brought this suit against Pierre A. Berthold to recover said \$4,000. The facts were all agreed upon.

*Garesche & Mead*, for plaintiff, in error.

I. At law there is no cause of action, because the plaintiff having received the note when it was past due, takes it subject to all of the equities attaching to it in the hands of the holder from whom he acquired it. Now, in the hands of the Third National Bank, from whom plaintiff received it, it was paid out of the collateral, and therefore the debt was extinguished. It matters not that it was paid out of plaintiff's funds. It was paid, and hence the note is dead.

II. In equity there could be no recovery, for it could only be had on the principle of substitution or subrogation; and subrogation and substitution occur only in case of "debtor and creditor," or in that of "principal and surety." Neither of these relations exist in this instance. Berthold owed no debt to Tesson, and therefore none to plaintiff. The agreed facts prove it to be an accommodation note drawn for Tesson's convenience. Tesson could as well have pledged the collateral for his own note. The Third National Bank gave credit on the strength of the collateral, not on that of the note of Berthold; hence it was no more Berthold's agency than Sarpy's through which the loss occurred. In the agreed facts it is expressly admitted that Tesson's transfer of a collateral was without the knowledge or consent of Berthold; and the act, when known to Berthold, was condemned by him. Hence, as the equities in favor of both are equal, the maxim applies, "*Potior est conditio defendentis.*" It is impossible to assign a reason why Berthold any more than Sarpy should be



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Berthold, Adm'r of Sarpy, v. Berthold.

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responsible for this loss. Subrogation and substitution apply only to the debtor and creditor, principal and surety. (Sto. Eq. Jur. 732, § 637; Constant v. Matteson, 22 Ill. 556.) The doctrine of substitution, being one of mere equity and benevolence, will never be enforced at the expense of a legal right. (Fink v. Mahaffy, 8 Watts, 382; Bank of Pennsylvania v. Portius, 10 Watts, 152; Erb's Appeal, 2 Penn. 296; Ziegler v. Long, 2 Watts, 206; McGinnis' Appeal, 16 Penn. St. 448.) Only in a clear case is it permitted, and where it works no injustice to others. (Lloyd v. Galbraith, 32 Penn. 103.)

III. Where there is a bond and no mortgage, and it is paid, the bond is *functus officio*, and no recovery can be had on it at law or in equity. (Sto. Eq. Jur. 578, § 499 *a*; Gadsden v. Brown, Speer's Eq. 37; Farmers' Bank v. Gilson, 6 Penn. St. 57; Bank v. Alger, 2 Hill's Ch. 267; Houston v. Branch Bank at Huntsville, 25 Ala. 261; Foster v. Trustees of Athenæum, 3 Ala. 302; Bibb v. Martin, 14 S. & M. 93; Bush v. Stamps, 26 Miss. 465; Garth v. Campbell, 10 Mo. 154; Hays v. Steamboat Columbus, 23 Mo. 234; Jones v. Bragg, 33 Mo. 339; Wade v. Beldmeir, 40 Mo. 486; Stewart v. Atkinson, *ante*, p. 510; Atkinson v. Angert, *ante*, p. 515.)

*Holliday*, for defendant in error.

I. The defendant, as maker of the note, is liable to plaintiff's intestate, who has paid full value for the same. (Holmes & Drake v. De Camp, 1 Johns. 36; Mechanics' Bank v. Hayard, 13 Johns. 356.)

II. Upon the payment of the amount of the note to the National Bank out of John Sarpy's funds, equity instantly subrogated John Sarpy to all the rights of the bank. Subrogation, in this case, is the right to be regarded as the purchaser of Berthold's note. (Bailey v. Broomfield, 8 Harris, 41; 1 Lead. Cas. Eq. 153.) The right of subrogation extends beyond the mere or ordinary and familiar relation of principal and surety, to every instance in which the position of two parties is such as to render one of them primarily liable for a debt which is a charge upon the estate of the other; for payment will give the latter a right to enforce



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Berthold, Adm'r of Sarpy, v. Berthold.

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all the remedies of the creditor against the latter. (Stevens v. Goodenough, 26 Verm. 676; Morris v. Oakford, 9 Barr, 498.) The equity of a surety to be subrogated to the rights which the creditor has against the principal debtor or his estate exists as well where the surety's property only is pledged as where he came under a personal responsibility. (3 Paige, 614, 642, 648; 11 Wend. 313; 7 Md. 164; 21 Barb. 262; Carter v. Jones, 5 Ired. 193; 8 Harris, 281.) The right of subrogation is wholly independent of the consent of those against whom it is enforced, and exists wherever the circumstances are such as to vest the property in the debt in those who seek to subrogate. (1 Comst. 505; 25 Verm. 28; 9 Barr, 212.) Sureties are entitled to the benefit of all securities taken up by them, also to collaterals. (1 Sto. Eq. Jur., § 499; 34 Ill. 489; 3 Cow., U. S., 461; 19 Mo. 622.)

III. Payment by one who stands in the relation of a surety, although it may extinguish the remedy or discharge the security as it respects the creditor, has not that effect between the surety and the principal debtor. As between them it is in the nature of a purchase by the surety from the debtor. It operates an assignment in equity of the debt and of all legal proceedings upon it, and gives a right in equity to call for an assignment of all securities and in favor of the surety; the debt and all its incidents and obligations are considered as still subsisting. Parties incurring subsequent responsibility are as much entitled to the benefit of this rule as if their liability arose from, or was cotemporaneous with, the original obligation. (Cottrell's Appeal, 11 Harris, 294; Haven v. Foley, 19 Mo. 622; Powell's Ex'r v. White *et al.*, 11 Leigh, 309; Mathey's Heirs v. Calhoun, 12 Leigh, 265, 274; 1 Johns. Ch. 409-13; 9 Watts, 451; 3 Watts & Serg. 401-4; 1 Barr, 512; 1 Hill's Ch. 344, 351; 2 Har. & Johns. 238; 4 Har. & Johns. 307-9; 5 Har. & Johns. 423-7; 2 Har. & Gill, 88-91; 2 Bland, 509, 529; 1 Harrington, 374, 377-8, and note.) Accordingly, if the First National Bank had canceled or surrendered Berthold's note to him discharged, the right of subrogation in John Sarpy would still exist. (See 18 Me. 400; 36 Me.

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Berthold, Adm'r of Sarpy, v. Berthold.

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322; 5 Ired. Eq. 193; 1 Comst. 595; 9 Barr, 21; 8 Harris, 281; 25 Mo. 28; 1 Am. Lead. Cas. 408.)

BLISS, Judge, delivered the opinion of the court.

The \$10,000 note due Sarpy was deposited as collateral security for the payment of the one made by defendant for the accommodation of Tesson & Son. When the last-named note fell due, the maker, Berthold, failed to pay it, and the holders took their pay out of the proceeds of the note belonging to Sarpy. Sarpy was thus made to pay the debt of defendant, and now asks to be subrogated to the right of the holder of defendant's note. This, stripped of the unusual circumstances that surround it, is all there is of the case as presented. There is no question as to the plaintiff's equity. It would be altogether superfluous to give the multitude of cases all pointing in the same direction, where it is held that a surety who had paid the debt of another is subrogated to all the rights of the creditor as to other securities in his hands. (Sto. Eq., § 499, and cases cited; 1 W. & T. Eq. Cas. 144, 3d Am. ed., and cases cited; Haven v. Foley, 18 Mo. 136; 19 Mo. 632.) So, in the United States, though not in England, it is held that a surety who pays the debt of the principal is entitled to an assignment of the instrument paid. (Sto. Eq., note 3 to § 499 c.) This is disputed in *Copis v. Middleton*, 1 Turn. & Russ. 224, upon the ground that an instrument thus paid is extinguished and would be worthless in the hands of the surety. But in *Hodgson v. Shaw*, 3 Myl. & K. 183, it was held, in an elaborate opinion by Lord Brougham, that when a bond was given as collateral security for another bond, the surety upon the collateral bond who had paid it was entitled to be subrogated to all the rights of the creditor as to the first bond; that he had become in equity its purchaser and was entitled to its assignment. The chancellor distinguished the case from *Copis v. Middleton*, and held that the original security still subsisted, notwithstanding the discharge of the second security, and notwithstanding the inability of the creditor to avail himself of it; but it subsisted "only to the effect of clothing the surety with that creditor's rights against the principal debtor." It does not matter, so far as the rights

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Berthold, Adm'r of Sarpy, v. Berthold.

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of the present plaintiffs are concerned, which view is held, yet I can not but be impressed with the broader equity and superior reason of the American cases. Lord Eldon held, in *Copis v. Middleton*, that the payment of the obligation by the surety extinguished it. So it does, so far as the creditor is concerned, but it should not be extinguished as to any right the surety has acquired by its payment. It should still subsist with its liens and priorities to enable him to recover of the principal as well as to compel contribution by co-sureties, or to avail himself of any securities or collaterals turned out by the principal. So, when the second obligation turned out as collateral is paid, the original instrument, so far as the creditor is concerned, is paid and extinguished, but is still alive in favor of him who has paid it, and he should be permitted to avail himself of any rights in regard to it to which its purchase would entitle him.

Counsel for defendant claims that the doctrine of subrogation can only apply between parties to a contract, and where the relation of principal and surety exists. But I can see no reason in thus confining its beneficial operation, and the law does not so confine it. (*Furnold v. Bank of State of Missouri*, 44 Mo. 336.) Plaintiff's intestate was made against his will to pay the note of defendant. His equities would not have been greater had he been an indorser of the note or had he executed a collateral. It would seem that they should rather be less, for in that case he would voluntarily have assumed a risk. If, through the agency of defendant and bad faith of Tesson, Son & Co., he is compelled to pay this note, I am wholly at a loss to conceive how the equitable claim of his administratrix to all she can make out of the instrument he was thus made to pay can be less than if, as in *Hodgson v. Shaw*, he had given a collateral obligation to pay. Her rights arise from the fact that her intestate has paid, and was compelled to pay, what others should have paid; and for that reason she is entitled to whatever benefit she may derive from an assignment to her of the instrument thus paid. In *Valle's Heirs v. Fleming's Heirs*, 29 Mo. 152, though not a case like the present, the doctrine of subrogation was carried to its fullest extent, and founded upon the naked justice of the case and not upon contract. (See 4 Johns. Ch. 123, 130; 1 Comst. 599.)

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The State of Missouri v. Coulter.

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Defendant also claims that he should not be charged, because the equities are equal ; but in this he greatly mistakes the relations and mutual obligations of the parties. Suppose the plaintiff's intestate had consented that the note belonging to him be deposited as collateral, or that he had himself made a collateral promise in writing to pay defendant's note, it is clear that defendant would be bound to repay him. The fact that defendant was an accommodation maker could only avail him against his principal, nor against those whose obligations were subsequent to his.

This case is submitted upon an agreed statement of facts, and the pleadings are informal. Counsel upon both sides have argued it as though it were an equitable proceeding for subrogation, yet I can not see how it becomes necessary to resort to this doctrine in order to enable the plaintiff to recover.

Were there any securities to be reached, were any advantage to be derived from an assignment of the note, or did the plaintiff seek any other proper equitable relief, she has a clear equity which should command the interposition of the chancellor. But she seeks to avail herself of the personal liability of defendant, and against him she has a clear legal claim, and is entitled to the ordinary money judgment which she obtained, and which is affirmed. The other judges concur.

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THE STATE OF MISSOURI, Plaintiff in Error, v. JOHN COULTER,  
Defendant in Error.

1. *Indictment, sufficiency of—Informality.*—An indictment, although technically faulty and unscientific, yet if the averments required by the statute are sufficiently made, will be substantially good. (Wagn. Stat. 1090, § 27.)

*Error to Sixth District Court.*

Hollister, with Attorney-General, for plaintiff in error, cited Train & Heard's Prec. & Indict. 50-4, 459-63 ; Wagn. Stat. 1090, § 27.



*Geo. H. Shields and Lancaster*, for defendant in error.

The indictment fails to set forth any offense. There is no surplusage. No words can be stricken out of the indictment and make it good, without inserting others, in lieu thereof. The indictment did not properly set forth the material allegations constituting the crime of an attempt to commit robbery. (Wharton's Prec. & Indict. 1048 *et seq.*)

WAGNER, Judge, delivered the opinion of the court.

The defendant was indicted and convicted in the Ralls County Circuit Court of attempting to commit a robbery. A motion was made in arrest of judgment, and sustained on account of the insufficiency of the indictment. The indictment is informal and inartificial, and charges the defendant with the commission of the crime by attempting to put him, "the said Bartlett Homes, in fear of some immediate injury to his person, with the intent feloniously to take the property of Bartlett Homes from his person, in his presence and against his will, and thirty-five dollars of money of the goods and chattels, personal property and money of the said Bartlett Homes, from his person, in his presence, and against the will of said Bartlett Homes, and then and there feloniously and violently to seize, take, steal, and carry away," etc.

There is much other matter contained in the indictment which is irrelevant and redundant, but may be disregarded and held as surplusage. The statute describing the crime upon which the attempt was founded, says that "every person who shall be convicted of feloniously taking the property of another from his person, or in his presence, and against his will, by violence to his person, or by putting him in fear of some immediate injury to his person, shall be adjudged guilty of robbery in the first degree." (Wagn. Stat. 456, § 20.)

Notwithstanding the want of orderly arrangement, and the prolix and involved manner in which the charge is set forth, we think it is substantially good. Although the pleading is technically faulty and unscientific, yet all the averments required by the statute are sufficiently made. The objection goes more to the



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The State of Missouri v. Brockman.

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form than the substance, and our statute enacts that no indictment shall be deemed invalid, nor shall the trial, judgment, or other proceedings thereon be stayed, arrested, or be in any manner affected for any defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits. (Wagn. Stat. 1090, § 27.) The indictment fully apprised the accused of the offense with which he was charged; and its informality and want of precision could in no wise operate to his prejudice.

The judgment should be reversed and the cause remanded. The other judges concur.

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THE STATE OF MISSOURI, Respondent, v. WM. T. BROCKMAN,  
Appellant.

1. *Criminal law — Indictment — Larceny — Evidence — Confession, when not voluntary and inadmissible.*— Under an indictment for larceny it appeared that defendant A. was a young man; that the prosecutor, B., a strong and vigorous man, who had been his former master, charged him with stealing his property, which charge A. denied; whereupon B. said he knew better; that he knew all about it, and that A. had better own up. A. then inquired whether, if he did confess, he would be let alone and not prosecuted. B. replied that he would make no promises; that he would not say whether he would let him go or not; but that he might as well own up, and that it would be better for him. A. then said he would tell all about it. No other persons were present. B. then reduced the confession to writing, and the next morning, A. denying its truth and demanding the delivery of the paper, he was arrested and indicted. *Held*, that, considering the relative situation of the parties, such a charge and assertion of knowledge of B.'s guilt were manifestly calculated to produce fear and intimidation; and that, although no positive promise was made, an allurements was held out which excited hope. And *held*, that a confession under such circumstances was not a voluntary one, such as, of itself, to warrant a conviction; not only so, but it was inadmissible, and should not have been given in evidence.

When a confession is forced from the mind by the torture of fear or the flattery of hope, it comes in such a questionable shape that it should be wholly rejected.

*Appeal from St. Louis Criminal Court.*

R. S. McDonald, for appellant.

I. The court erred in permitting the confession of the defendant to go to the jury. (1 Greenl. Ev. 263-66, §§ 219-22; 1 Phil.

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The State of Missouri v. Brockman.

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Ev. 449, and authorities cited; *Rex v. Gibbon*, 1 C. & P. 97; *Rex v. Enoch & Mary Pullen*, 5 C. & P. 539; 8 C. & P. 734; *Hector v. The State*, 2 Mo. 135; 1 Arch. Crim. Pl. 125-6; *Roberts' Case*, 1 Dev. 259-64; *Roscoe's Crim. Ev.* 34; *Rex v. Cooper*, 5 C. & P. 535; 15 Wend. 231.)

II. The law declares that the inducements, to make the confession of a prisoner inadmissible, must be held out by a person in authority. A constable, magistrate, or prosecutor, are considered as persons in authority. (1 Greenl. Ev. 367, § 222; *Thompson's Case*, 1 Leach Crim. Cas. 325; Eng. L. & Eq. 586; *Chabbock's Case*, 1 Mass. 144; *Joy on Confessions*, 59-61; *Rex v. Parratt*, 4 C. & P. 570; *Rex v. Enoch*, *supra*.)

III. The case of *State v. Hawkins*, 7 Mo. 190, is not in point. There the words used did not cause the confession, but the declarations or admissions were caused by the altercation and not by the words of the sheriff.

*Charles P. Johnson*, Circuit Attorney, and *H. B. Johnson*, Attorney-General, for respondent.

The confession was not rendered inadmissible by reason of the prosecutor telling him, the defendant, that it would be better for him to tell all about it—the prosecutor distinctly informing the defendant at the time that he had no promises to make. (*Hawkins v. State*, 7 Mo. 190; 1 Greenl. Ev., § 229; 1 Phil. Ev. 547-50.)

WAGNER, Judge, delivered the opinion of the court.

That confessions induced by the flattery of hope, or terror of punishment, are not admissible in evidence, is a principle well settled in our jurisprudence. (*Hester v. State*, 2 Mo. 166.) In the case of *Hawkins v. State*, 7 Mo. 190, where the confession was received, it does not appear that any influence was exerted over the accused by the person who had her in charge. In that case the defendant was indicted and convicted for poisoning her husband; and whilst she and a negro woman, who was also arrested as a participant in the crime, were in charge of the sheriff and another person, a conversation grew up between the

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The State of Missouri v. Brockman.

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defendant and the negro woman, who she evidently thought had betrayed her and divulged the whole transaction; upon hearing which the sheriff remarked that it would be better in the long run to tell the truth about the matter, but did not give any reason why it would be better to do so. The defendant made no answer to this; but a number of minutes afterward, when they were at the sheriff's house, the defendant and the negro woman continued their criminations and recriminations, and finally the whole matter was disclosed. To the objection to the admissibility of this confession, the court very properly says: "She (the defendant) seems to have been laboring under the impression that the negro had betrayed her, and her language was dictated by a sense of disapprobation of her conduct. Laboring under the same impression, she afterward commences an expostulation with the negro, and in the course of their altercation their guilt is disclosed; it is impossible to say that these disclosures were caused by anything said by the witness."

But before any confession can be received in evidence in a criminal case, it must be shown that it was voluntary. "A free and voluntary confession," said Eyre, C. B., "is deserving of the highest credit because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope or the torture of fear, comes in so questionable a shape, when it is to be considered as evidence of guilt, that no credit ought to be given to it; and therefore it is rejected." (Warrickshall's Case, 1 Leach's Crim. Cas. 299.)

Phillips states the rule as follows: "A promise of benefit or favor, or threat of intimidation or disfavor, connected with the subject of the charge, held out by a person having authority in the matter, will be sufficient to exclude a confession made in consequence of such inducement, either of hope or fear. The prosecutor or prosecutor's wife, or attorney, or the prisoner's master or mistress, or a constable, or a person assisting him in the apprehension or custody, or a magistrate acting in the business, or other magistrate, has been respectively looked upon as having authority in the matter." (1 Phil. Ev. 544, and cases cited.)

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The State of Missouri v. Brockman.

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As an illustration of the rule, a few cases may be referred to. Thus, where the prosecutor said to the prisoner, "Unless you give me a more satisfactory account I will take you before a magistrate," evidence of the confession thereupon made was rejected. (Thompson's Case, 1 Leach's Crim. Cas. 325; see also Commonwealth v. Harmon, 4 Barr, 269; State v. Cowen, 7 Ired. 239.) It was also rejected where the language used by the prosecutor was, "If you will tell me where my goods are I will be favorable to you" (Cass's Case, 1 Leach, 328; Boyd v. State, 2 Humph. 37); where the constable who arrested the prisoner said, "It is of no use for you to deny it, for there are the men and boy who will swear they saw you do it." (Rex v. Mills, 6 C. & P. 146.)

Whilst a confession freely and voluntarily made may furnish the most complete and satisfactory evidence, yet its admissibility should depend upon its being free of the suspicion that it was obtained by threats of severity or promises of favor, and of every influence whatever.

By the application of these principles to the case at bar, we will see whether the confession was admissible. The prosecutor, a man strong and vigorous, who had been the former master of the young man who is now the defendant, went to him and said that he had been stealing his property. The defendant answered that he had not been stealing from him. The prosecutor said he knew better, he knew all about it, and that the defendant had better own up. The defendant then inquired whether, if he did confess, he would be let alone and not prosecuted. The prosecutor replied that he would make no promises; that he would not say whether he would let him go or not; but that he might as well own up, and it would be better for him. The defendant then said he would tell all about it. No other persons were present. The prosecutor then reduced the confession to writing, and the next morning the defendant denied its truth and demanded the delivery of the paper, whereupon a policeman was called, and he was arrested, indicted, and convicted upon the evidence of his own confession. The written confession, however, was not produced, and mere oral evidence of it was given.



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The State of Missouri v. Brockman.

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When the defendant was confronted with the accusation, accompanied by the positive assertion that he was guilty, and that the witness knew all about it, it was well calculated to excite in his bosom emotions of fear. Such a charge and conversation, between two men standing on grounds of perfect equality, might not have that effect. But here was a man who claimed that he had positive knowledge of the defendant's guilt, which placed him within his power; and, considering the relative situation of the parties, it is preposterous to say that this was not calculated to produce fear and intimidation in the defendant. Although no positive promise was made, the allurements were held out which excited hope. The prosecutor would not say whether he would let the prisoner go, but assured him he had better confess, and that it would be better for him. This was a gleam of sunshine, and at once brought hope. It told him that, with positive proof against him, a confession would be to his advantage, and on that inducement the confession was undoubtedly made.

This was surely not a voluntary confession; it was superinduced by resorting to a false pretext, and setting a trap to catch the unwary. Such a practice can not be endured. A voluntary confession is deserving of credit because it is presumed to flow from a sense of guilt, but at best it is liable to be reported inaccurately, and is seldom remembered with precision; and when it is forced from the mind by the torture of fear or the flattery of hope, it comes in such a questionable shape that it should be wholly rejected. I think the confession was inadmissible and should not have been given in evidence. There was some other evidence given on the trial that was mere hearsay, and ought to have been excluded.

The judgment must be reversed and the cause remanded. The other judges concur.



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Reppy et al. v. Reppy et al.

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**B. S. REPPY *et al.*, Defendants in Error, v. H. S. REPPY *et al.*,  
Plaintiffs in Error.**

1. *Equity—Husband and wife—Voluntary assignment by an insolvent, of demands due himself, to his wife.*—Where a husband causes certain promissory notes, the consideration of which moved from himself alone, to be made payable to the order of his wife, the act will be regarded as a voluntary assignment or transfer of the claim to her without consideration; and if the husband is then insolvent, and such conveyance was made with intent to hinder, delay, and defraud creditors, it would be, for that reason, utterly void as to them.
2. *Equity—Offset—Set-off or counter-claim.*—In regard to a set-off or counter-claim, equity usually follows the law, but not always. When an insolvent plaintiff is suing, equity will take jurisdiction of unliquidated claims, and allow offsets which would not be allowed in law. But a demand can not be set off any more in equity than in law, unless it existed against the plaintiff, in favor of the defendant, at the time of the commencement of the suit, and had then become due.

*Error to Second District Court.*

*Green & Thomas*, for plaintiffs in error.

I. The answer sets up facts which constitute a good legal and equitable defense to plaintiffs' action. The consideration for the notes sued on moved from B. S. Reppy alone; his wife had no interest whatever in the goods sold to defendant; the making of the notes sued on payable to her was a fraud on the existing creditors of B. S. Reppy. The notes sued on really belong to him alone, and his creditors have an equitable right to subject said notes to the payment of their debts. A husband can not, by deed or otherwise, assign his property to his wife when he is largely indebted or insolvent, with intent to cheat and defraud his existing creditors. (1 Sto. Eq., § 359; Gen. Stat. 1855, p. 439, § 2; *Potter et al. v. McDowell*, 31 Mo. 62; *Pawley v. Vogel*, 42 Mo. 291.)

II. If the facts alleged in the answer be true, then, although the notes sued on are made payable to the wife, yet in equity she has no right to them; and it becomes necessary to invoke a court of equity to divest the wife of such apparent legal rights to the notes sued on, and to decree that they be made subject to the payment of the demands held by defendants against B. S. Reppy.

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Reppy et al. v. Reppy et al.

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III. The demands set up by defendants against B. S. Reppy are certain and definite, and therefore constitute a good equitable set-off against plaintiffs' action. (Field v. Oliver, 43 Mo. 200; Sto. Eq. Jur., §§ 1436-7, 1437 *a*, 1437 *b*; Collins v. Farquhar, 4 Litt. 154; Jones v. Waggoner's Adm'r, 7 J. J. Marsh. 144.)

IV. The facts alleged in the answer would constitute a good cause of action against plaintiffs, legally or equitably, and therefore constitute a good defense. (1 Tiff. & Smith, N. Y. Pr., 380; 1 Sto. Eq., § 349 *et seq.*)

*J. J. Williams*, for defendants in error, cited Gen. Stat. 1865, p. 602, § 1; 2 Sto. Eq., § 1436, note; Field v. Oliver, 43 Mo. 200; Rowe v. Langley, Am. Law Reg., August, 1870, p. 518; 2 Smith's Lead. Cas. 374.

CURRIER, Judge, delivered the opinion of the court.

By way of defense and counter-claim, the defendants in their answer set up various demands owned and held by them against the plaintiff, B. S. Reppy, the husband of the other plaintiff. As against him, a portion of these demands, at least, constitutes a proper subject of set-off. But the claim sued on is made up of two notes, both of which are payable to Mrs. Reppy alone. The defendants admit their execution; and then proceed to allege that at the time the notes were executed they were not aware of their being made payable to their creditor's wife, Mrs. Reppy; that the consideration moved exclusively from her husband, and that he drew them payable to his wife fraudulently and with a view to hinder and delay his creditors generally, and among them the defendants. It is further alleged that B. S. Reppy was, at the time the notes were executed, insolvent and unable to meet his liabilities, and that he has so remained ever since; and further, that a judgment against him would be of no value. It is also alleged that Mrs. Reppy paid nothing for the notes; that they were made payable to her without value or consideration. The answer then concludes with a prayer for the divestiture of Mrs. Reppy's title to the notes, and that the same be vested in her husband, and for an allowance of the demands due the defendants

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Reppy et al. v. Reppy et al.

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in reduction or satisfaction of the amounts due on the notes. The answer was stricken out, and the question is raised whether the facts alleged exhibit grounds for equitable relief.

The notes sued on, as the answer shows, were given for a debt due by the defendants to B. S. Reppy. The act of Reppy, therefore, in making the notes payable to Mrs. Reppy, may be regarded as a voluntary assignment or transfer of the claim to her without consideration. If this was done, as the answer avers, to defraud, hinder, and delay Reppy's creditors, the assignment, in the language of the statute, was "clearly and utterly void." (Gen. Stat. 1865, p. 439, § 2; Potter v. McDowell, 31 Mo. 62; Pawley v. Vogel, 42 Mo. 291.) If the assignment was thus void, then no title passed as against Reppy's creditors, and particularly as against the defendants. In equity, at least, the title may be treated as still in Reppy; and the answer is framed upon the theory of an equitable defense or counter-claim. The facts being as alleged—and they stand as though admitted—it would involve the grossest injustice to permit the amount of the notes to be collected out of the defendants and leave them to a barren remedy against a bankrupt debtor.

In regard to a set-off or counter-claim, equity usually follows the law, but not always. When an insolvent plaintiff is suing, equity will take jurisdiction of unliquidated claims, and allow off-sets which would not be allowed at law. (Waterman on Set-off, 80, note, and 371-2, note; Bradley v. Angell, 3 Comst. 475; Ainslee v. Boynton, 2 Barb. 253.) But a demand can not be set off in equity any more than at law, unless it existed against the plaintiff, in favor of the defendant, at the time of the commencement of the suit, and had then become due. (Waterman on Set-off, 427, § 381.)

In my opinion the court committed error in striking out the defendant's answer and counter-claim. I therefore recommend a reversal of the judgment and the remanding of the cause. The other judges concur.

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Newland v. Brooks.—The City of St. Louis v. Grone et al.

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WILLIAM NEWLAND Plaintiff in Error, v. JOHN P. BROOKS,  
Defendant in Error.

1. Pike v. Megoun, 44 Mo. 491, affirmed.

*Error to Sixth District Court.*

*Lewis & Lamb*, for plaintiff in error.

*Green & Wilson*, for defendant in error.

CURRIER, Judge, delivered the opinion of the court.

The defendant was an officer of registration in Ralls county, and acted as such in receiving and registering the names of voters. This suit is brought against him to recover damages for the unlawful and corrupt exclusion of the plaintiff from registration. The petition was demurred to, and the same questions are brought up for examination which this court considered and decided in Pike v. Megoun, 44 Mo. 491. That decision determines the disposition which must be made of the present suit.

The judgment will be reversed and the cause remanded. The other judges concur.

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THE CITY OF ST. LOUIS, Appellant, v. GRONE & WHELAN,  
Respondents.

1. *Revenue—Taxation on private vehicles—Ordinance 7127 not authorized by section 19, p. 63, Sess. Acts 1867.*—The provision of the charter of the city of St. Louis, empowering the mayor and city council to license, tax, and regulate horse railroads, hackney carriages, etc. (Sess. Acts 1867, p. 63, § 19), was intended to apply solely to a class who transact business for the public, and hold themselves out to the community as seeking public employment, and was not designed to extend to vehicles used by persons for their own convenience, or in the transaction of their own private business, and not engaged in any public employment for which compensation is received. And under that provision the city council had no authority to pass ordinance 7127, compelling persons to take out licenses for vehicles used by them for exclusively private purposes.

*Appeal from St. Louis Criminal Court.*

McGinness, and Woerner & Kehr, for appellant, cited 31 Penn. St. 15.

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The City of St. Louis v. Grone et al.

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*R. S. Macdonald*, for respondents, cited 31 Penn. St. 15.

WAGNER, Judge, delivered the opinion of the court.

This case was submitted to the court below on an agreed statement of facts, and judgment was rendered for the defendants. The action was for a violation of ordinance No. 7127, entitled "an ordinance amendatory of ordinance No. 6596, concerning public and private vehicles, and authorizing the appointment of two additional vehicle inspectors," approved February 3, 1870. The first section of this ordinance provides that "all vehicles, public or private, using the streets of the city for trade or traffic, or for any other purpose, no matter whether the owner or owners reside in the city or out of it, shall be subject to the rate of license tax mentioned in ordinance No. 6596." The second section declares that "no vehicles of any kind are exempted from the payment of the tax or license named in ordinance 6596, except those bringing produce produced by the vendor to the different markets for sale." The third section requires all such vehicles to be numbered, etc.

Ordinance 6596, passed July 3, 1868, of which the foregoing is amendatory, in its first section fixes the amount of license tax to be levied on each vehicle, public or private; and in the third section provision is made that the owners of such vehicles having paid the annual license tax shall be released from all other taxes on the same to the city of St. Louis during the period for which the said tax is paid.

It is agreed between the parties that the defendant Whelan was, on and after the 19th day of April, 1870, the owner of four two-horse wagons, which were then used on the streets of the city for the purpose of conveying and transporting beer and soda-water sold by Whelan to the persons having purchased the same from his brewery and factory to the places of business and saloons of such purchasers; that such vehicles were used on the streets of the city in the manner and for the purposes aforesaid; that the vehicle inspector notified Whelan to take out a license, which he refused to do; that Whelan is one of a firm



of brewers and soda-water manufacturers who manufacture beer and soda-water, and that said wagons are used exclusively in carrying beer and soda-water manufactured by them to the different parts of the city where it is sold and offered for sale; that these wagons have been assessed by the city against Whelan for the year 1870; that this assessment is a lien for the amount or tax on personal property, and, finally, that the wagons in question are not used for any other purpose than that above stated. Such are the facts agreed on. The violation of the ordinance is palpable, and the only question is, had the city council, under the charter, authority to pass a law compelling Whelan to take out a license for vehicles used by him for the exclusive purposes mentioned in the agreed case?

The provision of the charter under which the power is sought to be maintained, declares that the mayor and city council shall have power by ordinance "to license, tax, and regulate horse railroads, \* \* \* hackney carriages, omnibuses, carts, drays, and other vehicles, and fix the rates to be charged for the carriage of persons and the wagonage, cartage, and drayage of property." It will be observed that the ordinance refers to and requires license to be taken out on all vehicles, public or private, no matter for what purpose they are used, and whether they are public or private. According to the literal interpretation of this law, every person who may keep a vehicle for his private use must obtain the license or else be liable to the penalties imposed. This ordinance is certainly extraordinary in its character, and must be strictly construed. What was the obvious intent of the Legislature in passing the enactment? Was such an exercise of power as this contemplated? The clause must be taken as a whole to show its purpose, object, and scope. It is "to license, tax, and regulate horse railroads, \* \* \* hackney carriages, omnibuses, carts, drays, and other vehicles, and fix the rate to be charged for the carriage of persons and the wagonage, cartage, and drayage of property."

The whole context of this grant of power shows that it was intended to apply to a class who transact business for the public, and hold themselves out to the community as seeking general

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Haegele v. Mallinckrodt.

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employment. Viewed in that light as a police regulation, it is of admitted utility and convenience, and promotes uniformity and prevents extortion. But that consideration has no influence as respects private vehicles which are used by their owners purely for private purposes. These are subjected to a general tax as any other personal property.

I am satisfied, from the general wording of the statute, that the Legislature never intended that the power should extend to vehicles used by persons for their own convenience or in the transaction of their private business, and not engaged in any public employment for which compensation is received.

Judgment affirmed. The other judges concur.

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FREDERICK HAEGELE, Appellant, v. E. MALLINCKRODT,  
Respondent.

1. *Revenue—Ordinance for macadamizing street—Certified tax bill—Evidence.*—An ordinance which simply authorizes the macadamizing of a particular street between given points, without furnishing any directions as to the manner of doing the work, is insufficient to sustain an action by a city contractor on a certified tax bill against the owner of property adjoining the street so improved. (See *Sheehan v. Gleeson*, ante, p. 100.)

Under the act of 1860 (Adj. Sess. Acts 1859-60, p. 383), plaintiff in such a suit might make out a *prima facie* case, independent of the ordinance, by putting in evidence the tax bills; but under the act of 1866 (Sess. Acts 1866, p. 296) the tax bill would not be even *prima facie* evidence of the validity of the claim, but only of the fact that the work had been done as claimed.

*Appeal from St. Louis Circuit Court.*

This was a suit by a city contractor against the owner of adjoining property, on three special tax bills issued by the city of St. Louis for the improvement of Destrehan street, by virtue of city ordinance No. 5853. Said ordinance is as follows:

[No. 5853.]

AN ORDINANCE FOR THE IMPROVEMENT OF DESTREHAN STREET, FROM NORTH SECOND STREET TO THE MISSISSIPPI RIVER.

*Be it ordained by the City Council of the city of St. Louis:* SECTION 1. The city engineer is hereby authorized and instructed to cause Destrehan street, from North Second street to the Mississippi river, to be graded and macadamized.

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Haegele v. Mallinckrodt.

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SEC. 2. The sum of two thousand dollars is hereby appropriated to defray the cost of grading, payable out of the New Limit Fund of the Tenth Ward; and the cost of macadamizing shall be assessed as a special tax against the property fronting on said street, in accordance with law.

Approved July 3, 1866.

*L. & F. Gottschalk*, for appellant.

I. The court below erred in excluding ordinance No. 5853, offered by plaintiff. This ordinance was alleged in the petition, and was excluded by the court for the reason that it was void, in that it omitted to ordain what material was to be used for macadamizing. This omission did not make the ordinance void, but only made it incomplete, and plaintiff had the right to show that another ordinance covered this omission. But by excluding this ordinance, which was the authority to do this work, plaintiff was debarred from introducing any evidence.

II. The court erred in preventing plaintiff from showing, by witness Bischoff, city engineer, that the only way of macadamizing known in St. Louis was the way in which it was done, and what was universally understood by the term "macadamizing" in St. Louis. (1 Greenl. Ev. 332, § 292, 12th ed.; 2 Greenl. Ev. 222.)

III. The special tax bills were proven and in evidence, and this made a *prima facie* case for plaintiff. (City, to use of Lohrum, v. Coons, 37 Mo. 44; City, to use of Stadler, v. Armstrong, 38 Mo. 29; City, to use of Creamer, v. Oeters, 36 Mo. 456.) The difference in the language of the law of 1860 and 1866 is immaterial, as both say that such special tax bills shall be *prima facie* evidence "of the liability of the person therein named as the owner of such property."

• *Krum, Decker & Krum*, and *Schulenberg*, for respondent.

I. A party relying upon a city ordinance must set it forth in his pleading, otherwise he can not offer it in evidence on trial. (Mooney v. Kennett, 19 Mo. 555.) There was no foundation laid in plaintiff's petition for the introduction of any ordinance other than No. 5853.

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Haegele v. Mallinckrodt.

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II. The macadamizing of the street can only be done in such manner, to such extent, of such dimensions, and of such material, as shall be provided by ordinance. If the ordinance fails to provide for these, it fails to comply with the charter. (*Ruggles v. Collier*, 43 Mo. 353; *City, to use of Murphy, v. Clemens*, 43 Mo. 395, and cases cited.)

CURRIER, Judge, delivered the opinion of the court.

The decision made at the last March term of this court, in *Sheehan v. Gleeson*, disposes of most of the questions arising upon this record. The main difference between the two cases consists in this: that in the case referred to, the general as well as the special ordinance bearing upon the issues was pleaded and shown by the record; whereas the special ordinance alone appears here. The present suit is based upon city ordinance No. 5853, which simply authorizes the macadamizing of a particular street between given points, without furnishing any directions as to the manner of doing the work. That was left to the discretion of the engineer for aught the ordinance shows. The insufficiency of such an ordinance for the purposes contemplated was recognized in *Sheehan v. Gleeson*; but that case was helped out by the provisions of the general ordinance prescribing the materials and directing the manner of macadamizing. But that ordinance, as already remarked, is not in the present record, and we can not take judicial notice of its existence. The case, as it stands, falls within the principle of the decisions in *Ruggles v. Collier*, and *City to use of Murphy v. Clemens*, 43 Mo. 353 and 395. The Circuit Court correctly held that ordinance 5853, apart from the general ordinance, was insufficient to sustain the plaintiff's suit. But the plaintiff insists that he had made a *prima facie* case, independently of the ordinances, by putting in evidence the certified special tax bills sued on. That would have been so under the act of 1860 (Adj. Sess. Acts 1859-60, p. 385), which provided that the certified tax bill should be received as *prima facie* evidence of the validity of the claim, as well as of the fact that the work had been done. That particular provision was repealed in 1866, and a very different clause submitted in its place. By the

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Schafroth v. Ambs et al.

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act of 1866 (Sess. Acts 1866, p. 296), it is provided that the certified tax bill shall be *prima facie* evidence, not of the validity of the claim, but of the fact that the "work," etc., had been done as claimed. This change in the structure of the law makes it evident that the Legislature intended to change the prior statutory rule of evidence in such cases, thereby leaving the party claimant to make proof of the existence of a valid and sufficient ordinance or ordinances in the usual way. Under the act last referred to, a certified tax bill is not evidence on that point.

The judgment must be affirmed. The other judges concur.

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WILLIAM SCHAFROTH, Plaintiff in Error, v. PETER AMBS AND  
CATHERINE AMBS, Defendants in Error.

1. *Married women* — *Separate estate can not be acquired by husband permitting wife to collect rents, issues, etc.* — When the deed does not by its terms vest a separate estate in a married woman, the marital rights of her husband in the estate conveyed can not be alienated or defeated, *dehors* the deed, merely by his permitting her to hold and enjoy the property and collect and apply the rents, issues, and profits to her own use; nor can the wife in that way acquire a separate property in such estate.

*Appeal from St. Louis Circuit Court.*

*Sharp & Broadhead*, for plaintiff in error.

I. The petition alleges in precise, apt terms: 1. That the property was conveyed to Mrs. Ambs before her marriage with defendant Peter Ambs, and while she was discovert. 2. That upon said marriage with defendant Peter, she assumed the separate use and enjoyment of said property, and has ever since had the sole and separate use thereof. 3. That the husband assented, upon said marriage, to her sole and separate holding and use of said property, and has ever since said marriage concurred in this separate use and holding to which he had given his assent. These facts, upon the plainest principles of equity, create in Mrs. Ambs a separate use in this property cognizable in a court of equity. (See this case, *ante*, p. 114; Richardson's Adm'r v. Estate of



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Schafroth v. Ambs et al.

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Merrill *et al.*, 32 Verm. 37; Porter v. Bank of Rutland, 19 Verm. 410; McKennan v. Phillips, 6 Whart. 576; Garlick v. Strong, 3 Paige, 440; Strong v. Skinner, 4 Barb., S. C., 546.) And this ruling commends itself to a court of equity upon grounds of soundest morality and policy, and is entirely analogous to the long-settled rules of administering equity in similar subjects.

II. It is equally a well-known doctrine of equity that parties will be held bound to the natural and necessary interpretation of their own acts and declarations, even between themselves, when interests have been based thereon, and undeniably where the rights of third parties have intervened. To vindicate the rights of parties contracting with the wife upon the faith of her separate ownership of and power to bind this property, requires but the application of the same principles and practice long adopted by courts of equity upon the analogous subject of property employed by a married woman engaged ostensibly as a sole trader. Courts of equity at an early day held that, by agreement between the husband and wife, the latter might be enabled to conduct a business as a sole trader, and the property employed in such business and the proceeds thereof would be treated as her separate estate, and the rights of parties contracting with her vindicated therefrom. And now for a long time it has been the settled rule that if the husband permits her to carry on the occupation as though she were a sole trader, the same separate rights will be held to attach to the property employed and the proceeds of the business as though the actual agreement had been made, which their acts and dealing justify the world in believing had been made. Coughlin v. Ryan, 43 Mo. 99, refers to this doctrine as perfectly analogous.

*H. A. Clover*, for defendants in error.

I. The bill or petition, as a proceeding in equity, is wholly insufficient to entitle the plaintiff to the aid and interposition of a court of equity.

II. A married woman is not chargeable upon her note executed when covert, either in law or equity, either as to her general or separate estate, unless the note on its face shows and expresses

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Schafroth v. Ambs et al.

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an intention to charge her separate estate, or it is alleged in the bill and proven that the consideration for her indebtedness was incurred for the benefit of her separate estate. (*Kimm v. Weipert, ante*, p. 532. The defendant, Catherine Ambs, never had a separate estate. Her estate was a legal estate.

III. From the pleadings as amended, after the reversal of this cause, it does not appear that the property described in the petition was held by defendant, Mrs. Ambs, in any separate or equitable estate. And this court, sitting as a court of equity upon the matters stated in said plaintiff's petition, can not render a decree for plaintiff subjecting the general estate of a married woman to the payment of her note.

CURRIER, Judge, delivered the opinion of the court.

The petition in this cause shows that the defendant, Mrs. Catherine Ambs, prior to her intermarriage with the other defendant, Peter Ambs, acquired the premises in question in her own right; that she has ever since occupied, used, and enjoyed the same, and the rents, issues, and profits, as her separate estate; that her after-taken husband, Peter Ambs, assented to, approved, and acquiesced in such separate use, holding, and enjoyment; and that both the defendants, at all times, at and after said marriage, treated said premises as the sole and separate estate of said Catherine Ambs. The petition is framed upon the theory that such separate holding, use, and treatment of said premises, and the rents, issues, and profits, had the effect to change the character of the estate created by the deed, and to convert it into a technical separate estate, released and discharged from the marital rights of said Peter Ambs. The correctness of this theory is brought in issue by a demurrer to the petition.

Since this case was here on a former occasion (*ante*, p. 114) the petition has been radically changed by amendment. It was averred in the original petition not only that Mrs. Ambs used and enjoyed the property as her separate estate, but also that a separate estate was created and vested in her by the original deed. And it was held that a separate estate might be vested in a *femme sole* by a deed of purchase, without the intervention of

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Schafroth v. Ambs et al.

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trustees; and that was the extent of the decision on this point, although it was remarked that in the particular case then under consideration the subsequent holding, as shown by the pleadings, was in conformity to the terms of the deed, and apparently with the husband's consent. This circumstance was adverted to as showing a practical recognition and confirmation of Mrs. Ambs' separate rights under the deed, and not as fixing in her any rights in opposition to it. The deed was the essential thing; the rest was circumstantial. The plaintiff now, however, founds himself not upon the deed, but upon facts *dehors* the deed. He no longer pretends that the deed vested a separate estate in Mrs. Ambs, or that it was designed to have that effect. He claims, in substance, that Ambs lost his marital rights in the property in virtue of the alleged use and treatment of it subsequent to the marriage, coupled with his assent to and acquiescence in such use and treatment.

In *Bradish v. Gibbs*, 3 Johns. Ch. 523, it was decided that a mere agreement entered into before marriage, between the intended wife and the after-taken husband, that the former should have the power to dispose of her real and personal estate during coverture, would enable her to do so. In that case the disposition was by will, and the decision rests upon the fact that the antenuptial agreement conferred upon the woman the power to make such disposal. And it has been decided by this court (*Coughlin v. Ryan*, 43 Mo. 99) that where a wife held a leasehold at the time of her marriage, and her husband permitted her to hold and enjoy the property and collect and apply the rents and profits to her own use, the accumulation of such rents and profits would become her separate property, and descend to her heirs in opposition to the marital rights of her husband. But it does not appear ever to have been held that the marital rights of the husband in the real estate of his wife could be alienated or defeated in that way, or that the wife could in that way acquire a separate property in such estate.

The demurrer was properly sustained, and the judgment will be affirmed. The other judges concur.

**STATE OF MISSOURI, Respondent, v. T. M. WOLFF, Appellant.**

1. *Criminal law — Information for selling intoxicating liquors — Allegata and probata.*—Where an information for selling intoxicating liquors in quantities less than ten gallons, charged that the sales were made "to A. and divers other persons to informant unknown," and the evidence showed sales to other parties, but none to A., the variance between the pleadings and proofs was immaterial.

*Appeal from St. Louis Court of Criminal Correction.*

*Davis & Bowman*, for appellant.

*J. P. Colcord*, and *H. B. Johnson*, Attorney-General, for respondent.

*CURRIER*, Judge, delivered the opinion of the court.

The defendant was proceeded against in the St. Louis Court of Criminal Correction, by information, for selling intoxicating liquors in quantities less than ten gallons. The information charges that the sales were made to one William Ingersoll and to "divers other persons whose names were to the affiant (complainant) unknown." There was no proof of any sale to Ingersoll, but the evidence tended to show the fact of sales to other parties. It is objected that there is a fatal variance between the allegations and proofs. This objection seems to be founded upon the assumption that it is not alleged that the names of the "divers other persons" mentioned in the complaint were unknown to the complainant. That fact is distinctly averred, as a recurrence to the complaint will show. The variance between the pleadings and proofs was immaterial. (2 Whart. Am. Crim. Law, §§ 2443-4.)

Let the judgment be affirmed. The other judges concur.



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Palmer et al. v. Hatch et al.

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E. PALMER *et al.*, Appellants, v. SAMUEL HATCH *et al.*  
Respondents.

1. *Sales—Warranty—Seizure by United States Government—General power of sale does not imply power to warrant against.*—An authority to an agent to sell goods includes, in the absence of countervailing circumstances, authority to employ the usual modes and means of accomplishing the object proposed, such as a warranty of the quality and condition of the article sold. But a naked general power of sale given the agent does not carry with it such unusual authority as a right to warrant against any seizure of the article sold —*e. g.*, whisky—for violation of the revenue laws prior to sale.

*Appeal from St. Louis Circuit Court.*

*Donaldson & Skinker*, for appellants.

I. The overwhelming weight of decisions sustain the agent's implied power to give warranty at the time of sale, because "a warranty is one of the usual means of effecting a sale." (6 Hill, 336; Fenn v. Harrison, 3 T. R. 761; 4 T. R. 117; Helyear v. Hawke, 5 Espin. 72; Woodin v. Buford, 2 Cramp & M. 391; Andrews v. Kneeland, 6 Cow. 354; Nelson v. Cowing, 6 Hill, 336; Milburn v. Belloni, 34 Barb. 607; Hunter v. Jamison, 6 Ired. 255-60; Woodford v. McClanahan, 4 Gilm., Ill., 90; Sanford v. Handy, 23 Wend. 260; Schuhardt v. Allens, 1 Wall., S. C., 369; Skinner v. Green, 9 Porter, Ala., 305; Gains v. McKinley, 1 Ala. 446; Bradford v. Bush, 10 Ala. 300; Cocke v. Campbell, 13 Ala. 286; Franklin v. Ezell, 1 Sneed, Tenn., 500; Dennis v. Ashley's Adm'r, 15 Mo. 453; Taylor v. La-beaume, 44 Mo. 572; Smith's Merc. Law, 164.) Dennis v. Ashley's Adm'r settles the law of this case.

II. The warranty in this case was one not inappropriate to the subject-matter. It was, in effect, an agreement of indemnity, like all other warranties. Under the United States revenue law, March 3, 1867 (14 U. S. Stat. at Large, 482, §§ 14, 21), rectified whisky sold or offered for sale at less than the tax rate was subject to seizure and forfeiture as for non-payment of taxes (of which such sale or offer was *prima facie* evidence), and the burden of proof lay with the claimant to show that the tax had



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Palmer et al. v. Hatch et al.

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been paid. (5 Blatchf. 542.) This whisky was offered and sold at less than the tax rate. It was therefore brought in imminent danger of seizure, and was liable to entail great loss on plaintiffs. If seized, the burden of proof of payment of taxes lay upon plaintiffs.

*Harding & Crane*, for respondents.

CURRIER, Judge, delivered the opinion of the court.

It appears that the defendants, in July, 1867, sold and delivered to the plaintiffs sundry casks of whisky. It is averred in the petition that, at the time of the sale, the defendants, through their agent, Richardson, promised and agreed, in consideration of the purchase, to indemnify the plaintiffs against any loss or expense which might accrue to them in consequence of any seizure of said whisky on account of any supposed violation of the revenue laws of the United States prior to the sale. The petition further shows that the whisky was subsequently seized and proceeded against for an alleged non-payment of taxes prior to the sale; that it was afterwards released, and that the plaintiffs incurred considerable expense in defending the property against the claim of the government. The recovery of these expenses is the object of this suit.

At the trial the plaintiffs called one of the defendants as a witness, who testified as follows: "Richardson was our agent. We sent him out to sell whisky through the country. He sold by a printed card of prices. This card was the only instruction we gave him. He was not authorized to give any warranty." This was all the evidence in relation to the scope of the agency.

The court excluded evidence and gave and refused instructions, upon the theory that there was no evidence tending to show authority in Richardson to bind his principals as parties to the alleged contract of warranty; and this action of the Circuit Court is what is complained of as erroneous. The plaintiffs insist that the authority to make the contract springs out of and results from Richardson's authority to make sales; that the authority to warrant was an incident of his agency. There would be force in this

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Palmer et al. v. Hatch et al.

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view if the warranty had been of the title, condition, or quality of the article sold, or that it was free from tax liens. But such was not the character of the warranty.

The warranty set up in the petition had no reference to the condition or quality of the goods. It had reference alone to a contingent future seizure, and was a warranty against seizures which might be groundless and unwarranted. Was the giving of such a warranty one of the ordinary and usual modes of effecting sales? It does not so appear. A warranty against an unlawful interference would seem to be unusual and extraordinary. An authority to enter into such a contract can not be implied from Richardson's selling agency. Other proof is required to establish the fact of the existence of such a power. The evidence negatives the existence of any express authority, and the plaintiffs rest the case upon the implied powers of the agent.

The general doctrine on this subject is not doubtful. An authority to an agent to sell goods, such as the defendants conferred upon Richardson, includes, in the absence of countervailing circumstances, authority to employ the usual modes and means of accomplishing the object proposed, such as a warranty of the quality and condition of the article sold. (Sto. Agency, § 85; *Nelson v. Cowing*, 6 Hill, 336.)

But the warranty counted upon in the plaintiffs' petition, as we have seen, is not of that character. It extends to and assumes to warrant the plaintiffs against gratuitous and unwarrantable interferences with the subject of the sale. Such warranties, it is apprehended, are of rare occurrence. The authority of an agent to make them is not inferable from a naked general authority to sell.

The judgment will be affirmed. The other judges concur.

STATE OF MISSOURI, Respondent, v. REUBEN ARMSTRONG,  
Appellant.

1. *Practice — Supreme Court — Transcript — Clerk — Affirmance.*—On *superseas* in a criminal prosecution, where the clerk of the trial court sends up the transcript as required by statute (Wagn. Stat. 1114-15, § 16), but the appellant fails to prosecute his appeal, and the judgment of the lower court appears to be regular, it will be affirmed. But the duty of bringing up the transcript is personal to the clerk, without the application of the accused (45 Mo. 153); and *semble*, that where respondent brings in the transcript and moves for an affirmance, on the ground that appellant has failed to file it, the motion will be overruled.

*Appeal from St. Louis Court of Criminal Correction.*

J. P. Colcord, and H. B. Johnson, Attorney-General, for respondent.

Claiborne, for appellant.

BLISS, Judge, delivered the opinion of the court.

The defendant was convicted of gambling, in the St. Louis Court of Criminal Correction, and fined ten dollars, and the court thereupon allowed an appeal, ordered a stay of proceedings, and took the proper recognizance. The clerk, under the provisions of section 16, pp. 1114-15, Wagner's Statutes, sent up the transcript, but the appellant fails to prosecute his appeal by presenting a brief of the facts and points upon which he relies, or to appear at all in this court.

At the last term, counsel for the State brought in the transcript and moved an affirmance of the judgment upon the ground that the appellant had not filed it; but the motion was overruled for the reason that where there is a stay of proceedings upon appeal, it is the duty of the clerk, in a criminal action, to send up a transcript without the application of the appellant. (State *ex rel.* Miller v. Daily, 45 Mo. 153.) But while it is the duty of the clerk to return the transcript in such cases, it is also the duty of the appellant to prosecute his appeal as in civil cases, except that no assignment of errors is required (Wagn. Stat. 1115, § 20), or the court will be at liberty to affirm the judgment.

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Stillwell et al. v. How et al.

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We are not advised in regard to the points upon which the appellant relies, and the judgment appears regular and will be affirmed. The other judges concur.

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SAMUEL STILLWELL *et al.*, Respondents, *v.* JOHN HOW *et al.*,  
Appellants.

1. *Bills and notes — Indorsers — Co-sureties.*—In order to make successive accommodation indorsers co-sureties, there must be an express understanding or agreement to that effect between the indorsers.

*Appeal from St. Louis Circuit Court.*

*Krum & Decker*, for respondents.

*Rankin & Hayden*, for appellants.

BLISS, Judge, delivered the opinion of the court.

How, Smith, and Stillwell, in the order named, were accommodation indorsers of a promissory note made by one Bernoudy. The note was renewed several times, and at the last renewal Stillwell's indorsement, instead of being made by him was made by his partner in the name of the firm, but in the same order. This note was paid by the firm, and they now bring suit against How and Smith as previous indorsers. But the defendants claim that they should not be held in the order of their indorsement for the reason that it was the understanding and agreement between all the indorsers that they placed their names upon the paper as co-sureties, and were to be equally bound in case it was not paid by the maker. Upon this issue the case went to the jury, who found for the defendant at special term; but the judgment was reversed at general term for alleged errors in the instructions.

The court instructed the jury in substance: 1. That if the jury find that, before any indorsements were made, How declared to one of the plaintiffs his understanding that all the indorsers were to be jointly liable as sureties of Bernoudy, and no objection or protest was made, and afterward they indorsed the note



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Stillwell et al. v. How et al.

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without notifying How of the manner in which they considered themselves bound, they should find for defendants. 2. That if plaintiffs and defendants indorsed the note intending to become jointly liable as co-sureties, and not according to priority, defendants are not holden.

The vice in the first instruction consists principally in the fact that it seems to call attention to the circumstances under which the last renewal was made, without reference to the previous notes. The note before the last had gone to protest, and in the absence of Mr. Stillwell, Mr. Powell, his partner, saw Mr. How in relation to it, and requested him to take it up, as the protest of Stillwell injured the credit of the house. Mr. How was willing to pay a third, claiming that that was the agreement, and was unwilling to do anything to release Stillwell. Mr. Powell made no objection to this claim, and said that he did not know in what manner Mr. Stillwell had indorsed it, and afterward placed the name of Stillwell, Powell & Co. upon the note sued on, being a renewal of the one protested. It is perfectly clear that Mr. Powell intended to assume for the firm the same obligation formerly assumed by Mr. Stillwell, and no other; and to instruct the jury that because Mr. Powell, before indorsing the note, did not object to and protest against the claim of Mr. How, he should be held to have assented to it, and to have thereby contracted to pay one-third of the note, is altogether wrong. It is true that at the last renewal a new contract in relation to the character of the indorsements might have been made, but there is no evidence that a new one was made; and if Mr. Stillwell was not holden to contribution as co-surety upon the original note, the present plaintiffs are not so holden upon the one sued on. The instruction was altogether misleading, and made the silence of a stranger to the original agreement—one who knew nothing and professed to know nothing of its terms—operate as a consent to the view of one of the parties to it, and also operate as a new agreement in accordance with that view.

The second instruction was correct, as were also those given at the request of the plaintiffs. The doctrine of the commercial law, in relation to the liabilities as between themselves, of the several



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Britton v. Dierker.

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accommodation indorsers of bills of exchange and promissory notes, has been adopted and uniformly enforced by this court, and no special announcement of it is now necessary. (McNeilly v. Patchin, 23 Mo. 40; Dunn v. Wade, *id.* 207; McCune v. Belt, 45 Mo. 174.)

The judgment of the general term is affirmed and the cause remanded for a new trial. The other judges concur.

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JOHN R. BRITTON, Respondent, v. ERNST H. DIERKER,  
Appellant.

1. *Bills and notes—Alteration of, prior to delivery, discharges surety, when.*—The alteration in the date of a note vitiates it as to a surety, where the alteration is made without his consent. And it makes no difference that the alteration was made by one of the makers prior to the delivery of the note.

*Appeal from St. Louis Circuit Court.*

*Bruere*, for appellant.

There was error in the refusal of defendant's first instruction. (Wood v. Steele, 6 Wall. 80; 2 Pars. Bills and Notes, 550-2; Chit. Bills, 182; Triggs v. Taylor, 27 Mo. 247; Henderson v. Bondurant, 39 Mo. 374.)

*Lewis*, and *Orrick & Emmons*, for respondent.

CURRIER, Judge, delivered the opinion of the court.

The evidence given on the trial of this cause tended to show that the note sued on was executed on the part of the defendant as the surety of the other makers; that after the note was signed by him, and without his knowledge or consent, but while it remained in the hands of the other makers, the date of the note was changed from "October —, 1867," to "November 17, 1867;" that such alteration was made prior to its delivery and without the privity of the plaintiff. The note was made payable to the order of the plaintiff six months after date. The trial was by the court, and defendant asked the following instruction,

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Britton v. Dierker.

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which was refused: "If the court believes from the evidence that the word 'October' or the date of the month was struck out, and the date 'November 17' inserted after the same was executed and delivered by the defendant to Barthol (one of the makers of the note), and that this was done without the consent or authority of the defendant, then the court will find for the defendant, even if it should believe that such alteration was made before the note was delivered to the plaintiff."

The refusal of this instruction is the principal matter complained of in the action of the court. The instruction presented a correct view of the law and ought to have been given.

The date was a material part of the note, and its alteration without the surety's consent vitiated the note as to him. It ceased to be the same instrument he had signed, and imposed a liability different from that he had assumed. "The law," says Chief Justice Tenny, "carefully guards the rights of sureties upon an instrument, whether the relation of principal is shown by being a surety in the technical sense of the term, indorsed or otherwise. A promissory note signed by the principal and surety, or a note or bill indorsed for the accommodation of another party thereto, defines the liability intended to be assumed; and any alteration changing this liability without his consent will discharge him, such as the change of the date, the amount, the time or place of payment." (*Waterman v. Vose*, 43 Me. 511.) This is undoubtedly a correct statement of the law on the subject to which it relates. And it makes no difference that the alteration was made by one of the makers prior to the delivery of the note. (*Wood v. Steele*, 6 Wall. 80.) In all material circumstances *Wood v. Steele* is identical with the case now under consideration. There the date of the note was changed from "September, 1858," to "October 11, 1858," without the consent of the surety, and he was held thereby to be discharged, although the change was made by one of the makers of the note prior to its delivery. (*Heffner v. Wenrich*, 32 Penn. St. 423; 2 Pars. Notes and Bills, 550; 33 Mo. 398, 406, 542.)

The judgment will be reversed and the cause remanded; the other judges concurring.

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The City of St. Louis v. Siegrist.

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THE CITY OF ST. LOUIS, Respondent, v. D. C. SIEGRIST,  
Appellant.

1. *Ordinances* — "*Tavern*," meaning of term. — The Legislature, in making use of the word "*tavern*" in the revised charter of the city of St. Louis (Sess. Acts 1867, p. 63, § 18), undoubtedly and manifestly intended to make it comprehend all hotels and houses which entertain and accommodate the public for compensation, even though they may not have the privilege of selling liquors.

R. S. MacDonald, for appellant.

The evidence in this case shows that the appellant keeps a house at which travelers are entertained and guests boarded. No dram-shop or stable are shown to be connected with it. It is a boarding-house, and in no sense can it be termed a tavern. The Legislature intended that all public houses at which there are liquors retailed, and having stables connected with them, should be licensed if the city council chose to exercise that power. The Legislature never intended the word "*tavern*" to embrace all the private boarding-houses in the city of St. Louis having ten or more rooms.

McGinness, City Attorney, and Woerner & Kehr, for respondent.

The terms "*hotels*" and "*boarding-houses*," in legal contemplation, are synonymous. (Webster's Dic., ed. 1864; Worcester's Dic., ed. 1860; Burrill's and Bouvier's Law Dic.; Crown Point v. Warner, 3 Hill, 156; Commonwealth v. Fells, 9 Leigh, 612; Curtis v. State of Ohio, 5 Ham. 324.)

WAGNER, Judge, delivered the opinion of the court.

The objection urged, that the complaint was insufficient and that the court erred in not dismissing it, is, we think, untenable. It is true it might have been more certain and precise, but it substantially set forth the facts constituting the violation of the ordinance and sufficiently apprised the defendant of what he was called on to defend against.

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The City of St. Louis v. Siegrist.

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The defendant was charged with violating an ordinance of the city of St. Louis providing for licensing hotels and boarding-houses. He was proprietor of the Olive Street Hotel, and it is shown that the house contained over one hundred rooms; that it was used for entertaining boarders and travelers for pay, and that the proceeds were paid to him.

Section 1 of the ordinance (Ordinance 6984, licensing hotels and boarding-houses, approved June 29, 1869) provides that any person keeping a public house for the accommodation of travelers, or who shall board persons from whom he receives any compensation, shall be deemed a hotel or boarding-house keeper.

By section 2 it is provided that every person or copartnership of persons keeping a hotel or boarding-house having ten or more rooms shall pay an annual license of one dollar for each and every room, etc.

Among other powers granted to the city by the charter, it has authority "to license, tax, and regulate auctioneers, grocers, merchants, retailers, and taverns."

The only point made in the case is, that the word "tavern" does not include a hotel. Webster defines a tavern to mean "a public house where entertainment and accommodation for travelers and other guests are provided; an inn; a hotel usually licensed to sell liquors in small quantities." At common law any person was an inn or tavern keeper who made it his business to entertain travelers or passengers and provide lodging and necessities for them, their horses and attendants. When they were licensed they usually had the privilege of selling liquors, but this depended wholly upon the provision of law.

"Tavern," "hotel," and "public house" are in this country used synonymously; and while they entertain the traveling public, and keep guests, and receive compensation therefor, they do not lose their character, though they may not have the privilege of selling liquors.

The distinction, as respects inn and tavern keepers, observed in England, under the common law, does not exist with us, and different names are applied to them, though "hotel" and

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Oster et al. v. Rabeneau.

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"house" are usually and commonly used to denote a higher order of public houses than the ordinary tavern or inn.

The Legislature, in making use of the word "tavern," undoubtedly and manifestly intended to apply it to the whole class, and make it comprehend all hotels and houses that entertain and accommodate the public for compensation.

Judgment affirmed. The other judges concur.

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PETER OSTER *et al.*, Appellants, *v.* DANIEL RABENEAU,  
Respondent.

1. *Mechanics' lien law to be liberally construed so as to advance the remedy, etc.*—The mechanics' lien statute is to be construed in reference to the intention of the Legislature in enacting it, and liberally, so as to advance the remedy, and not merely in the strictness of the letter.
2. *Mechanics' lien not void because description embraced more than one acre, when.*—A mechanic's lien upon a lot of land in the city of St. Louis was not void because the description of the property filed in the clerk's office embraced more than one acre, no fraud being suggested, and the description being sufficiently full and accurate to enable the court to make it certain and exact. And *semble*, that the locality of the acre to be subjected to the lien may be fixed and surveyed by a commissioner sent out for that purpose.

*Appeal from St. Louis Circuit Court.*

*F. & L. Gottschalk*, for appellants.

I. The quantity of land in a city, town, or village is not confined to one acre. (See Wagn. Stat. 909, § 1; Houck on Liens, 178, § 173; Derrick v. Edward, S. Dutch. 45.)

II. But if the law is held to be different, and the lien is held to extend only to one acre, the lien is not for that reason vitiated.

III. The court is the proper party to say what particular acre should be subjected to the lien, and may for that purpose order a survey of the land by commissioners and stake off the one acre. (Tibbits v. Moore, 23 Cal. 208.) The statute itself only requires a description of the premises "so near as to identify the same" (Wagn. Stat. 909, § 5), and it further provides (§§ 13-15) that the property should be correctly described in the judgment; so that



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Oster et al. v. Rabeneau.

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the court has the power to render judgment which part of the property shall be subject to the lien. Plaintiff gives in this case a correct description of the buildings and the lot upon which they are situated; and then claims in his petition expressly a lien upon one acre, and asks the court to fix the exact boundaries, which the court proceeds to do. (*Kennedy v. House & Horton*, 41 Penn. St. 39.)

*Pope*, for respondent.

I. The account and description filed in the clerk's office for the purpose of securing a mechanic's lien, and the petition, are not sufficient, under the statutes of this State, for the purpose of securing a lien. The description covers an amount of ground not allowed by the lien law.

II. The court erred in admitting improper, illegal, and naked evidence for plaintiffs, for an improper and illegal object, and in refusing to admit other proper evidence for defendant. The evidence of county surveyor Pitzman, for the purpose of supplying defects of the pleadings, was admitted against the objection of defendant. This evidence stated that, beginning at a given point and running in such and such manner so many feet, an acre was embraced, and that a given house stood on that acre. There was nothing in the pleadings to support this evidence. Its object—to cure pleadings—was illegal.

III. The requisites of the statute can not be supplied by parol evidence. The lien law is in derogation of the common law, and must be strictly complied with by every person who asserts a claim of right under it.

CURRIER, Judge, delivered the opinion of the court.

The only question requiring attention in this cause relates to the validity of the mechanic's lien herein sought to be enforced.

October 14, 1868, the plaintiff filed in the office of the clerk of the St. Louis Circuit Court a statement of his demand and a description of the premises sought thereby to be charged with a lien. The description was as follows: "A piece of ground in McRae's addition to the city of St. Louis, county and State

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Oster et al. v. Rabeneau.

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aforesaid, and being block No. 20 of said addition, a plat whereof is recorded in plat book No. 7, on page 7, in the recorder's office of said county, which piece is of a triangular form, containing one and thirty-five hundredths acres, and situated at the junction of the Pacific railroad and St. Louis avenue, and bounded by them west, north and south, and on the east by Virginia avenue."

The statute is supposed to limit the amount of land to be covered by a lien of this description to one acre, but the description above given embraces one and thirty-five hundredths of an acre, being in excess of the supposed statutory limit by thirty-five one-hundredths, and that, it is claimed, vitiates the whole lien, and so it was held by the Circuit Court at general term. This view rests upon the theory of a strict construction of the mechanics' lien law, which provides that the lien therein contemplated shall cover the building and the land on which it stands "to the extent of one acre; or if such building, erection, or improvement be upon any lot of land in any town, city, or village, then such lien shall be upon such building, erection, or improvement, and the *lot or land upon which the same are situated.*" (Wagn. Stat. 907, § 1.) Now, if this statute is to be construed with a rigid strictness, it is difficult to see how the acre limitation can be made to apply to a village or city lot; and the land in question, as has not been denied, is situated in a city. Indeed, it is quite plain that the first limitation was not intended to apply to city property at all. The provision as to town and city lots is wholly independent of the other provision, and is complete within itself. Where city property is concerned, the lien extends to the "lot or land" on which the building erected stands, be the same more or less. There are city buildings that cover more than an acre, and there can be no doubt that the lien in such a case would cover the entire building and also the entire area of ground occupied by the building. So the lien extends to the whole lot, although the building occupies but a small portion of it. A lot is a parcel or division of land, but what, in the sense of the mechanics' lien law, is its area? The statute does not say, nor does the acre limitation throw any certain light on the question. The term

"lot," as indicating quantity, is of the vaguest import; how much and what it includes must be determined by the facts and circumstances of each particular case. The term is broad enough to embrace the one and thirty-five hundredths of an acre described in the plaintiff's lien. But it is said it would be absurd to suppose that the Legislature intended to restrict the lien in the country to one acre, and at the same time to leave it unrestricted in towns and cities. There is force in this view, but it involves the abandonment of the theory of a strict construction. The statute, then, is to be construed with reference to the intention of the Legislature in enacting it, and liberally, so as to advance the remedy, and not merely in the strictness of the letter. The policy of the law is beneficent, and that policy has become thoroughly ingrafted upon our legislation, and must be taken into consideration in construing legislative enactments on this subject. (See *Putnam v. Ross*, *ante*, p. 337.)

Let it be assumed, then, for the purpose of this discussion, that the Legislature intended to restrict the lien to one acre in the city as well as in the country, is it thence to be concluded that the lien is wholly void where the description includes more than an acre? I think not. That would be harsh and unjustifiable, and at variance with the evident policy of the law. The statute contemplates no such result. It seems to anticipate possible imperfections in describing the premises to which the lien is to apply. All it requires, therefore, is that the lienor shall furnish, in filing his lien, such a description as will be sufficient to point out and identify the property. It provides that the lienor shall file a "true description of the property, *or so near as to identify the same.*"

That is all; and the language implies that the Legislature took into consideration possible difficulties in drawing up the description, so as to have it full and accurate in all particulars. If it was made sufficiently full and accurate to furnish the means of identification, that was sufficient. If it included too much, the lien was void as to the excess, no doubt; but to hold the lien void throughout because of such excess, in the absence of fraud or any wrongful intent, would be to initiate a line of decisions in

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Oster et al. v. Rabeneau.

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direct hostility to the purposes of the Legislature, as these purposes are disclosed by the enactment under review.

In the case at bar, the lienor described a single lot of ground. It was a city lot, and contained more than one acre. The description was sufficient for the purposes of general identification, and sufficient to enable the court, by commissioners or otherwise, to make it certain and exact in every respect prior to the judgment. The county surveyor measured off the acre connected with the erection, and the proper proof was made in court, and the court adopted the survey in rendering judgment against the property. I see no objection to that course; and if there had been various lienors furnishing different descriptions, and conflicting claims as to the exact locality to be given to the particular acre to be subjected to the respective liens, I see no objection to the court sending out a commissioner to survey and fix the locality of the acre to be subjected. (See *Gilham v. Kerone*, 45 Mo. 490.) Unless this can be done, how is it to be determined what portion of the larger lot shall be taken as the acre subject to the lien? If each lienor is to select for himself the particular acre to be taken, one might select an acre connected with the building lying northward, and another southward, and so on; that is, where the lot contained a number of acres, as might be the case in country localities.

My conclusion, then, is that the lien in this case was not void because the description of the property filed in the clerk's office embraced more than an acre. No fraud is suggested, and the description was sufficiently full and accurate to enable the court to make it certain and exact. In this case that must be regarded as certain which was capable of being made so; and which was in fact reduced to certainty in the judgment of the Circuit Court at special term.

*McWilliams v. Allan*, 45 Mo. 573, has been referred to as containing a strict construction of the mechanics' lien law. There the lienor filed a statement showing the *balance* of his account, without giving either the debit or credit side of the account. It was a mere naked balance without any of the facts from which that balance was deduced; and it was held that the statement was



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Nedvidek v. Meyer.

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not an account within the meaning of the statute; that it failed to meet the requirements of the act and the manifest purposes of the Legislature. The failure was not technical but substantial, and no reasonable liberality of construction could save the claim.

The judgment of the St. Louis Court at general term will be reversed, and that of the special term affirmed. Judge Bliss concurs; Judge Wagner absent.

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J. W. NEDVIDEK, Defendant in Error, v. J. H. G. MEYER,  
Plaintiff in Error.

1. *Practice, civil — Actions — Account — Rent.* — Where parties have mutual dealings, and rent from one to another becomes a subject of account between them, by mutual understanding and arrangement, it is recoverable in an action on account.
2. *Practice, civil — Evidence — Account — Items.* — Evidence is admissible touching different articles of merchandise sold, notwithstanding that they were embraced under one item, where the price paid was upon the mass, and not upon the individual articles.
3. *Evidence — Sale, bill of — Consideration, additional may be shown by parol.* — Where a bill of sale stated a consideration, but not the whole consideration which induced the sale, it was competent by oral evidence to supply the omission and show the additional consideration, if not inconsistent with that expressed in the original document.
4. *Practice, civil — Answers, party can not have two in same case at same time.* — Defendant can not have two answers pending in the same case at the same time — one principal and the other supplementary.

*Error to Second District Court.*

Conger, Reynolds & Perryman, for defendant in error.

Wingo & Relfe, for plaintiff in error.

CURTIS, Judge, delivered the opinion of the court.

The judgment herein is sought to be arrested because of the supposed mingling of different causes of action in the same count, and also because causes of action supposed to be incongruous are joined in the same petition. The suit is upon an account con-



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Nedvidek v. Meyer.

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taining items of charge for rent, board, services, and goods sold, together showing an aggregate of indebtedness amounting to \$2,098.57. Whether the rent was recoverable in an action upon the account is a question which can not be determined upon a motion in arrest. That is a matter to be settled by the evidence. If the parties had mutual dealings, and the rent became a subject of account between them, by mutual understanding and arrangement, it thereby became a proper matter of book charge, and recoverable in an action upon the account. (*Scott v. Lance*, 21 Verm. 507.) The account contained an item for goods sold amounting to \$1,077.67. At the trial, which was before a referee, the defendant objected to the plaintiff's evidence in support of this item, on the ground of non-compliance with the statute in regard to itemizing an account sued on. (*Wagn. Stat.* 1020, § 38.) The evidence was received notwithstanding the objection, and the referee found from it, for substance, that the charge was for a sale in gross for a round sum, without any specification of the value or price attached to the several articles sold. Under these circumstances we think the evidence was properly received. The price was upon the mass, and not upon the individual articles. The consideration of the purchase was therefore indivisible, and could not be apportioned or sub-itemized. The sale constituted but a single transaction, and laid the foundation but for a single charge for the value or price of the whole. The sale was in gross, and the charge or item in the account corresponded with the character of the sale. The referee further found that the plaintiff and another party had, prior to the sale, been in partnership in merchandising; that the firm was dissolved about the 1st of June, 1867, and that on the 19th of that month the residuum of goods then on hand was sold to the defendant, including the goods sued for in this action, these latter goods having been put into the joint business by the plaintiff. It is further found that it was arranged in the sale that the purchase money for these particular goods, valued, in gross, at \$950, should be paid to the plaintiff, treating them as separate from the joint stock. But the sale to the defendant was evidenced by a bill of sale which purported to embrace the whole joint stock, and also purported

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Nedvidek v. Meyer.

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to recite and set out the consideration paid and to be paid on account of it. The finding of the referee in regard to the \$950 was based on oral proofs, which the defendant objected to as tending to vary or contradict the written bill of sale. The bill of sale omitted to state anything about the \$950, and the question is whether oral evidence was admissible to explain the omission and show the actual facts of the transaction as regards the alleged omission.

On this subject it may be remarked that recitals in deeds and bills of sale showing the considerations upon which they were made, as in receipts showing the sums of things received, are *prima facie* but not conclusive evidence of the facts recited. (1 Greenl. Ev., §§ 285, 305, 7th ed.) In this regard, such documents may be explained, added to, or contradicted by oral proofs. Thus, where a deed recited a named consideration, it was held competent to show by oral evidence a further and additional consideration not mentioned in the deed, such additional consideration not being inconsistent with that expressed in the instrument. (Clifford v. Tuvill, 9 Ind. 633 ; 1 Greenl. Ev., § 285.)

The same principle applies to the bill of sale in question. It stated a consideration, but according to the oral evidence not the whole consideration which induced the sale. It was competent, therefore, by oral evidence to supply the omission and to show the actual consideration which moved between the parties. In other words, it was competent to show a consideration additional to that expressed in the written instrument. The additional consideration shown by the oral proofs was in no way inconsistent with that expressed in the written document. It was simply additional. It must be considered, therefore, that the objection to the parol evidence was properly overruled.

The objection to the testimony of Perryman and Dinning, as detailing confidential communications, is not well founded. Mr. Dinning declined testifying except upon consent, and the referee refused to adopt any measures of coercion. Mr. Perryman was not the defendant's attorney, and made no statement in regard to what passed in the office of Perryman & Dinning. As regards the amount paid by defendant in satisfaction of a judgment ren-

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Long v. Heinrich.

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dered against him as the plaintiff's garnishee, it is sufficient to say that the defendant has no ground of complaint respecting it.

The amount so paid by the defendant was allowed to him by the referee in the adjustment of the accounts. The judgment in the garnishment proceedings was no adjudication of the matters of claim between the present parties beyond the amount included in that judgment. Nor did the referee commit any error in refusing to the defendant permission to file before him a *supplemental* answer showing certain facts not embodied in the principal answers. Whatever the authority of the referee might be to allow any modification of the pleadings, it was not allowable for the defendant to have two answers pending in the case at the same time — one principal and the other supplementary. (Ticknor v. Voorhies, *ante*, p. 110.)

The referee disallowed certain items in the defendant's set-off, which accrued between certain dates, but upon precisely what ground the report fails to state. Evidence was given in support of the entire set-off, which the referee may not have found sufficient to sustain these particular charges; but the ground of the disallowance, as just observed, the record fails to disclose.

Upon the whole, I think the judgment should be affirmed. The other judges concur.

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JAMES LONG, Defendant in Error, v. PETER HEINRICH,  
Plaintiff in Error.

1. *Assignment — Chose in action not assignable — Assignee may sue on in his own name.*—An assignee of a chose in action, not assignable at common law, may bring suit thereon in his own name; and this right existed prior to and independent of section 4, chapter 21, R. C. 1855.

*Error to Second District Court.*

*Conger & Reynolds*, for plaintiff in error.

At common law this account, being a chose in action, was not assignable. It is not made assignable by our statute. The only statutory provision we have ever had on this subject was contained

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Long v. Heinrich.

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in section 4, chapter 21, R. C. 1855. Whatever of that chapter it was intended to retain was placed in the revision of 1865. (See Wagn. Stat. 239, note 1.) This was omitted (§ 4, ch. 21) and was consequently repealed. (Wagn. Stat. 896, §§ 2, 3.) The case of *Walker v. Mauro*, 18 Mo. 564, was under the act of 1849, and simply holds that in equity the debt was assignable; but the Legislature made assignable at law all choses in action, and the repeal of this section left it, as at common law, unassignable. The section in the practice act, that all actions shall be brought in the name of the real party in interest, does not apply; for if the account could not be assignable, no one but the original party to it could become the real party in interest. If plaintiff below was the equitable owner of the account, he should have resorted to his equitable remedy, and not sought the aid of the law, as for the enforcement of a legal right. If an equitable action, it should not have been tried as a legal one by the court as a jury. While the distinction between legal and equitable forms of action is abolished, yet the party must pursue his legal or equitable remedy distinctly, and not unite them. (*Jones v. Moore et al.*, 42 Mo. 413.)

*Perryman & Dinning, Van Alen & Wing, and Relfe,*  
for defendant in error.

I. Accounts, debts, and other choses in action were always assignable in equity. (2 Sto. Eq., §§ 1040, 1040 *a*, 1040 *b*, 1040 *c*, 1040 *d*, 1047 *a*, 1054, 1055, 1057.) Even at common law the assignee of a debt not in itself negotiable could, in a court of law, sue in the name of the assignor to use of the assignee. (2 Sto. Eq., § 1057 *a*.)

II. Section 4, chapter 21, R. C. 1855, never had any intrinsic worth. For the first time it appeared in the revision of 1855. Since the adoption of the code of 1849 (see § 1, art. III, of practice act, Sess. Acts 1849, p. 75) "every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in the next succeeding section; but this action shall not be deemed to authorize the assignment of a thing not

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Long v. Heinrich.

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arising out of contract." (R. C. 1855, p. 1217, § 1; Gen. Stat. 1865, p. 651, ch. 161, § 2; *id.* p. 398, ch. 87, §§ 7, 8.)

III. The debt sued on, and which is the subject of this action, was assignable, and the assignee could maintain an action thereon in his own name. (See *Walker v. Mauro*, 18 Mo. 564.) This case was decided in October, 1853, long before we had any statutory provisions on this subject. (See also *Smith v. Schibel*, 19 Mo. 140; *Smith v. Kennett*, 18 Mo. 154; *Smith v. Best*, 42 Mo. 185; *Bank of Commerce v. Bogy*, 44 Mo. 13; *Hutchings, to use, etc., v. Blackford*, 35 Mo. 285-6.)

BLISS, Judge, delivered the opinion of the court.

James Long & Co. advanced \$300 for defendant upon his written request, and the plaintiff, as assignee of James Long & Co., brings his suit to recover a balance due upon said advance. No defense upon the merits was made to the claim, the defendant only insisting that it was not assignable, and that the plaintiff could not sue in his own name. For this view he relies upon the fact that, in the revision of 1865, chapter 21, entitled "Bonds, notes, and accounts," found in the revision of 1855, was omitted; and section 4, providing for the assignment of accounts, is nowhere re-enacted. But this section was wholly unnecessary. Ever since the adoption of the code in 1849 it is necessary that every action be prosecuted in the name of the real party in interest, and if one owns a contract or account not assignable at common law, he should bring suit in his own name.

Gamble, J., in *Walker v. Mauro*, 18 Mo. 564, says: "The effect of our new code of practice in abolishing the distinction between law and equity, is to allow the assignee of a chose in action to bring suit in his own name in cases where, by the common law, no assignment would be recognized." This opinion was given in 1853, and before the enactment of said section 4, now dropped from the statutes.

The judgment of the District Court is affirmed. The other judges concur.



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Slevin et al. v. Reppy.

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**B. & J. SLEVIN & Co., Defendants in Error, v. H. S. REPPY,**  
**Plaintiff in Error.**

1. *Principal and agent — Evidence — Practice, civil — Pleadings.*—In a suit upon a promissory note, whether made by defendant himself or by his agent, the petition should charge that defendant made the note. This charge would be sustained by proof that the signature was by defendant personally, or by his duly authorized agent.

*Error to Second District Court.*

*A. J. Quigley and Leonard*, for defendants in error.

*Green & Thomas*, for plaintiff in error.

BLISS, Judge, delivered the opinion of the court.

The petition counts upon a promissory note made by defendant, whose name was signed by his brother and agent, B. S. Reppy. The right to thus use his name was denied, and upon that issue the plaintiff recovered judgment.

Many instructions were given, and the defendant complains chiefly of the following: "If the jury believe from the evidence that H. S. Reppy consented to and authorized B. S. Reppy to carry on the mercantile business, either as a partner or as agent in the name of 'H. S. Reppy,' and goods were purchased as such from the plaintiff in the name of H. S. Reppy, for which B. S. Reppy gave the note of H. S. Reppy, then the defendant is liable, provided the jury further believe that the plaintiffs were not informed of the private agreement between H. S. Reppy and B. S. Reppy." The objection to the charge is founded upon the language of the petition, which charges that the name of defendant was put to the note by B. S. Reppy, his agent, nothing being said about a secret partnership; and it is claimed that any evidence concerning or any consideration of such partnership is a departure.

The material fact set forth in the petition is that defendant made the note, not how he made it—whether by his own hand or by that of his agent. The mode of signing it need not have been averred. This material fact would be sustained by evidence

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Phillips, Adm'r, v. Phillips et al.

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either that the signature was in defendant's handwriting, or that it was made by another duly authorized by him.

The question of authority is one of evidence, not of pleading. The instruction, as given above, supposes that there might be some doubt whether B. S. Reppy was conducting the business of the maker of the note as his agent or his secret partner; nor does it matter. Either relation would authorize the making of the note, and the plaintiffs were not supposed to know that this apparent agent was a secret partner as well. The question whether he was one or the other might become important if it were sought to charge him personally upon the debt, but no such attempt is made, and the authority to execute the note has been found in favor of the plaintiffs.

Defendant's counsel truly say that a plaintiff can not declare upon one cause of action and recover upon another. But the record shows no such variance. Plaintiff sold defendant a bill of goods, billed them to him in his own proper name; his brother was conducting business in his name and with his consent; a balance upon the goods remaining unpaid, the note was given, and the pleadings raised the question whether it was his note. The private relations between him and his brother are only to be considered as affecting the question of authority to execute it; and if it turned out that he was secret partner as well as agent, it did not disprove the authority, and made no new cause of action.

The other judges concurring, the judgment is affirmed.

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AMOS R. PHILLIPS, ADMINISTRATOR, Appellant, v. PRESLEY  
PHILLIPS *et al.*, Respondents.

1. *Practice, civil — New trial, motion for — Newly-discovered evidence — Impeachment of witness.* — A new trial will not be granted for newly-discovered testimony if its only object is to assail or impeach the credibility of a witness.

*Appeal from Second District Court.*

*Ewing & Holliday*, for appellant.

*Hatcher & H. M. Jones*, for respondents.

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Phillips, Adm'r, v. Phillips et al.

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WAGNER, Judge, delivered the opinion of the court.

The overruling the motion for a new trial is the only question presented for consideration by this record. It is no ground of complaint to say that the deposition of Fay operated as a surprise upon the party, for that deposition had been filed in the cause for several days before the trial; and if it had not been examined and read before the cause was tried, it was on account of sheer negligence. The reason set up, that the party and his attorney had been too busy in court in attending to other causes to look into the deposition, can not be regarded as a sufficient answer to avoid their want of diligence. If such pretexts were allowed, there would be no end to the granting of new trials, and litigation would be indefinitely protracted.

The record, that it is pretended was wanted to use on the trial, existed in the court where the trial was had, and by the necessary and proper search and diligence could easily have been obtained. But if the record was admissible at all, it was only sought to be used to impeach the credibility of the witness, Fay, and a new trial will not be granted for newly-discovered testimony if its only object is to assail or impeach the credibility of a witness. (*Deer et al. v. The State*, 14 Mo. 348; *Jaccard v. Davis et al.*, 43 Mo. 535.)

Judgment affirmed. The other judges concur.

[ CONTINUED TO VOL. XLVII. ]

# INDEX.

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## A

### ABANDONMENT.

See INSURANCE, FIRE AND MARINE.

### ACCOUNT.

See EVIDENCE, 16. PRACTICE, CIVIL—ACTIONS, 6.

### ACKNOWLEDGMENT.

See CONVEYANCES.

### ADMINISTRATION.

1. *Administration—Will annexed, public administrator with, ordered to sell under will, can not be compelled to give deed by County Court.*—A public administrator, with the will annexed, was directed, under the will, to sell the real estate of the testator for a specified object not connected with the administration. Suit being brought in the County Court to compel him to execute a deed for the land to the purchaser, *held* as follows: 1st. County Courts exercising probate functions, although a branch of the State judiciary, have only such power and jurisdiction as are conferred on them by the statute. 2d. The act investing them with probate jurisdiction (1 Wagn. Stat. 440, § 7) does not clothe them with jurisdiction of such a proceeding. Where the authority of the administrator to sell is derived from the statute, he acts in obedience to the orders of the court, and is subject to its control, and the court possesses full supervisory power and jurisdiction in all matters touching the premises, as in compelling him to make a deed to the purchaser; but where a specific power to sell is conferred by will, and does not exist in consequence of any statute, the rule is otherwise, and the County Court can not entertain jurisdiction. The fact that the statute designates the administrator as the proper person to execute the power of sale, does not give it jurisdiction over the subject-matter. In the case cited relief should be sought in a court of chancery, and not in the County Court.—*Coil v. Pitman's Adm'r*, 51.

See COURTS, COUNTY, 5, 6. SALES, 2.

### ADMISSIONS.

See EVIDENCE.

### AGENCY.

1. *Bills and notes—Collector, as such, has no power to indorse and collect checks.*—Authority given to a collector to receive checks in lieu of cash, in payment of bills held for collection, does not confer authority to indorse and collect the checks. When he received the checks payable to his principals, his duty as collector ceased. His next duty was to account to his employers

**AGENCY—(Continued.)**

for the proceeds of his collections and turn over the checks to them to be disposed of as they might judge proper. The indorsement of the checks was no incident of the collection of the accounts.—*Graham v. U. S. Savings Institution*, 186.

2. *Marking initials—Agency—Liability—Bailments—Goods sold on commission, mistake in.*—In suit for the proceeds of certain goods forwarded defendants for sale on commission, where it appeared that through inadvertence plaintiff's agent marked them with the initials of the wrong consignor, and that, consequently, defendant paid the proceeds of the sale to the wrong person, plaintiff would not be entitled to recover. And evidence would be admissible to show that plaintiff had been well known by a name bearing other initials than those marked on the goods.—*Hays v. Warren*, 189.
3. *Sales—Warranty—Seizure by United States Government—General power of sale does not imply power to warrant against.*—An authority to an agent to sell goods includes, in the absence of countervailing circumstances, authority to employ the usual modes and means of accomplishing the object proposed, such as a warranty of the quality and condition of the article sold. But a naked general power of sale given the agent does not carry with it such unusual authority as a right to warrant against any seizure of the article sold—*e. g.*, whisky—for violation of the revenue laws prior to sale.—*Palmer v. Hatch*, 585.
4. *Principal and agent—Evidence—Practice, civil—Pleadings.*—In a suit upon a promissory note, whether made by defendant himself or by his agent, the petition should charge that defendant made the note. This charge would be sustained by proof that the signature was by defendant personally, or by his duly authorized agent.—*Slevin v. Reppy*, 606.

See **BANKS AND BANKING**, 2. **CONTRACTS**, 8, 23. **HUSBAND AND WIFE**, 1. **LANDLORD AND TENANT**, 8.

**ALTERATIONS.**

See **AMENDMENTS**. **CONVEYANCES**, 5.

**AMENDMENTS.**

See **CONVEYANCES**, 4. **JUSTICES' COURTS**, 2. **MECHANICS' LIENS**, 1. **PRACTICE, CIVIL**, 1. **PRACTICE, CIVIL—PLEADING**.

**APPEAL.**

See **PRACTICE, CIVIL—APPEAL**.

**ASSIGNMENT.**

1. *Assignment—Chose in action not assignable—Assignee may sue on in his own name.*—An assignee of a chose in action, not assignable at common law, may bring suit thereon in his own name; and this right existed prior to and independent of section 4, chapter 21, R. C. 1855.—*Long v. Heinrich*, 603.

**ATTACHMENT.**

1. The exemption of property from attachment, provided by 1 Wagner's Statutes, 185, § 19, is purely a matter of statutory regulation. And whenever a defendant in attachment is about to remove out of the State with intent to change his domicile, the protection of the statute ceases, and all that he possesses is liable to attachment.—*State, to use of Schnerr, v. Davis*, 108.
2. *Attachment—Plea in abatement, appeal will not lie from judgment on.*—Under the present statute (Wagn. Stat. 190, § 42)—amendment of act of 1855



ATTACHMENT--(Continued.)

(R. C. 1855, p. 252, § 47)—an appeal will not lie from the judgment of court upon a plea in abatement. (Anderson v. Moberly, *ante*, p. 191.)—Davis v. Perry, 449.

See JUSTICES' COURTS, 6.

ATTORNEYS.

See PARTITION, 2.

AUDITOR, STATE.

See LUNATIC ASYLUM, 1.

B

BAILMENT.

See AGENCY.

BANKS AND BANKING.

1. *Evidence—Draft—Testimony of bank cashier—Res gestæ.*—Where a draft sued on was held in bank by the cashier contrary to the usual mode of dealing with such paper, it is perfectly legitimate, as a part of the *res gestæ*, to give the declarations of the cashier concerning the paper, its object and character, and the relation of the drawer to him and the bank, so far as it throws light on the paper, while it was being so held.—National Bank of the Metropolis v. Williams, 17.
2. *Bills and notes—Bank responsible for laches of cashier, when and how far.*—In a suit by a bank on a bill of exchange drawn by defendant in favor of plaintiff, through its cashier, where the proof showed that the bank received it as a bill of exchange, discounted it in the usual course of business, and presented it for acceptance in a reasonable time, the parties to it would be holden under the law merchant, notwithstanding a private contract of the cashier, outside the scope of his authority, with the drawer, by which the drawer was not to be charged. But plaintiff must look to the paper as a bill of exchange, and charge the parties to it under the law merchant; and where the proof showed that it was drawn to enable the cashier to receive the proceeds of cotton which was to be shipped in the name of the drawer to a drawee in Boston; that it was not entered upon the books of the bank as discounted paper, but kept and counted as cash; that it was so retained until the cotton adventure turned out a failure, when it was presented for acceptance and protested, plaintiff can not recover. In such case, in order to recover at all, plaintiff must treat the bill as its own property, and not that of its cashier, and, as owner, must be charged with the laches of its agents and officers.—*Id.*
3. *Banks and banking institutions, liability in—Trover against national banks for money deposited prior to their reorganization.*—The Bank of the State of Missouri, by reorganizing under the act of Congress of 1863 (U. S. Stat. at Large, ch. 106, p. 112, § 44) as a national bank, lost none of its assets and escaped none of its liabilities. The change was a transit, and not a new creation; and in trover against the bank, after its reorganization, for certain packages of coin specially deposited with it prior to the change, *held*, that the proper rule of damages would be the value of the coin at date of its conversion, together with lawful interest thereon. *Held*, further, that the refusal of the bank, on

**BANKS AND BANKING—(Continued.)**

request, to return the deposit, was evidence of conversion, and, if unexplained, was conclusive of the fact.—*Coffey v. National Bank of State of Missouri*, 140.

See AGENCY, 1. EVIDENCE, 12.

**BILLS AND NOTES.**

1. *Evidence—Draft—Testimony of bank cashier—Res gestæ.*—Where a draft sued on was held in bank by the cashier contrary to the usual mode of dealing with such paper, it is perfectly legitimate, as a part of the *res gestæ*, to give the declarations of the cashier concerning the paper, its object and character, and the relation of the drawer to him and the bank, so far as it throws light on the paper, while it was being so held.—*National Bank of the Metropolis v. Williams*, 17.
2. *Bills and notes—Bank responsible for laches of cashier, when and how far.*—In a suit by a bank on a bill of exchange drawn by defendant in favor of plaintiff, through its cashier, where the proof showed that the bank received it as a bill of exchange, discounted it in the usual course of business, and presented it for acceptance in a reasonable time, the parties to it would be holden under the law merchant, notwithstanding a private contract of the cashier, outside the scope of his authority, with the drawer, by which the drawer was not to be charged. But plaintiff must look to the paper as a bill of exchange, and charge the parties to it under the law merchant; and where the proof showed that it was drawn to enable the cashier to receive the proceeds of cotton which was to be shipped in the name of the drawer to a drawee in Boston; that it was not entered upon the books of the bank as discounted paper, but kept and counted as cash; that it was so retained until the cotton adventure turned out a failure, when it was presented for acceptance and protested, plaintiff can not recover. In such case, in order to recover at all, plaintiff must treat the bill as its own property, and not that of its cashier, and, as owner, must be charged with the laches of its agents and officers.—*Id.*
3. *Bills and notes—Judgment against indorser—Costs of not recoverable by indorser from maker—Judgment, evidence of—Money paid.*—The indorser of a promissory note can not recover against the maker the costs of the judgment recovered against him as indorser. The judgment against the indorser is not evidence against the maker; and where the indorser has satisfied a judgment upon the note against himself, his claim against the maker is upon the note itself, and not for money paid. (*Fenn v. Dugdale*, 31 Mo. 580, affirmed.)—*Peers v. Kirkham*, 146.
4. *Bills and notes—Collector, as such, has no power to indorse and collect checks.*—Authority given to a collector to receive checks in lieu of cash, in payment of bills held for collection, does not confer authority to indorse and collect the checks. When he received the checks payable to his principals, his duty as collector ceased. His next duty was to account to his employers for the proceeds of his collections and turn over the checks to them to be disposed of as they might judge proper. The indorsement of the checks was no incident of the collection of the accounts.—*Graham v. U. S. Savings Institution*, 186.
5. *Bills and notes—Presentment—Request to present again—Waiver.*—The request by the drawer, on maturity of a bill of exchange, to present it again for payment, and the promise that it shall be met, cures all informalities as

**BILLS AND NOTES—(Continued.)**

to presentment and notice, and either admits or waives them.—*Harness v. Davies County Savings Association*, 357.

6. *Bills and notes—Funds in hands of drawee, reasonable expectation as to—Demand and protest.*—Where the drawer of a bill of exchange has failed to place funds in the hands of the drawee to meet it, and has no reasonable expectation that it will be met, demand of payment and protest are unnecessary to hold him.—*Id.*

7. *Bills and notes—Presentment—Demand—Funds in hands of drawee—Consent to present bill second time, no extinguishment of bill, when.*—A., living in Davies county, was in the habit of drawing on B. at New York, without funds in the hands of the drawee, but notifying C., his correspondent at St. Louis, who arranged with B. for payment. In the case at bar, he drew on B. without notifying C. as before, and the bill was dishonored. At A.'s request the holder again sent the bill forward for collection, and it was again protested. After the first protest, C. had deposited funds with B., but had withdrawn them prior to the second presentation, and soon after, C. failed with the funds in his hands. Suit being brought by the holder against A., it was urged that on the first presentment there had been no proper notice or demand to hold the drawer, and that an unreasonable time had elapsed before the second presentment. *Held:*

1. That A., having made no provision for payment in the first instance, and hence suffering no prejudice from failure of demand and notice, and having no reasonable expectation that the bill would be paid, was liable notwithstanding the want of proper notice to and demand upon B., and that the failure to present it in a reasonable time afterward was immaterial.

2. That the consent to send the bill forward did not extinguish the original bill. It was neither an extension of the original bill for a consideration nor a payment and satisfaction.

3. That the deposit with B. was no proper provision for the bill, and that A. was responsible for the withdrawal of the fund.—*Id.*

8. *Bills and notes—Indorsers—Co-sureties.*—In order to make successive accommodation indorsers co-sureties, there must be an express understanding or agreement to that effect between the indorsers.—*Stillwell v. How*, 589.

9. *Bills and notes—Alteration of, prior to delivery, discharges surety, when.*—The alteration in the date of a note vitiates it as to a surety, where the alteration is made without his consent. And it makes no difference that the alteration was made by one of the makers prior to the delivery of the note.—*Britton v. Dierker*, 591.

See AGENCY, 4. CONTRACTS, 21. HUSBAND AND WIFE, 14. MORTGAGES AND DEEDS OF TRUST, 5.

**BOATS AND VESSELS.**

See INSURANCE, FIRE AND MARINE.

**BONDS.**

See CONTRACTS, 16, 17, 18. DAMAGES, 5.

**BONDS, COUNTY.**

See MANDAMUS, 1.

**BOONVILLE, CITY OF.**

1. *Constitution—City of Boonville—Amendment of act of incorporation, constitutional.*—That part of section 1 of the act approved February 8, 1839

**BOONVILLE, CITY OF—(Continued.)**

(Sess. Acts 1888-9, p. 294), incorporating the city of Boonville, which related to its boundaries, was amended by the act of 1868 (Sess. Acts 1868, p. 191), and everything relating to this subject was re-enacted in the amended law, as a substitute for the old one. *Held*, that the act of 1868 was not invalid as being repugnant to section 25, article IV, of the State Constitution, because the whole of section 1 of the act of 1839, as amended, was not embodied and inserted in the amendment.—*Boonville v. Trigg*, 288.

**BROKERS, REAL ESTATE.**

See **CONTRACTS**, 23.

**C****CERTIORARI.**

See **COURTS, COUNTY, 3. PRACTICE, CIVIL—APPEAL.**

**CHOSSES IN ACTION.**

See **ASSIGNMENT**, 1.

**CITIES.**

See **CORPORATIONS**, 4.

**CLAY COUNTY.**

See **MANDAMUS**, 1.

**CLERKS OF COURTS.**

See **PRACTICE, CIVIL—APPEAL**, 10.

**COLLECTORS.**

See **OFFICERS**.

**CONFESSION.**

See **PRACTICE, CRIMINAL**, 15.

**CONSIDERATION.**

See **CONTRACTS**, 9, 10, 12. **EVIDENCE**, 16, 17.

**CONSIGNMENTS.**

See **AGENCY**, 2.

**CONSTITUTION OF MISSOURI.**

See **BOONVILLE, CITY OF**, 1. **ELECTIONS**, 1. **PUBLIC PRINTER**, 1.

**CONTINUANCE.**

See **PRACTICE, CIVIL—TRIALS**, 1, 2, 8.

**CONTRACTS.**

1. *Guaranty—Whether to be held continuing or otherwise—Construction, how determined.*—When it is doubtful, from the language contained in it, whether a guaranty was for a single dealing or a continuous one, the true principle of sound ethics is not to set up a presumption for or against the guarantor, but to give the contract the sense in which the person making the promise believed the other party to have accepted it, if he in fact did so accept it.—*Boehne v. Murphy*, 57.
2. *Contract—Stamp, omission of—Intent.*—Where an order, as originally drawn, was without a revenue stamp, and no issue was made at the time of the trial in relation to the intent of the omission, an objection to the introduction of the order was properly overruled. (*Whitehill v. Shickle*, 43 Mo. 537, affirmed.)—*Id.*



## CONTRACTS—(Continued.)

3. *Contracts—Latent ambiguity—In contract of doubtful meaning, construction of, as shown by continued conduct of parties, should prevail over that given by court.*—In the use of words of doubtful meaning or application, the meaning and application given by the parties who used them should prevail over an interpretation that might otherwise be given by the court. In the interpretation of contracts of this sort, regard should not be had to loose declarations, or equivocal or isolated acts; but the continuous conduct of the parties for a series of years concerning the subject-matter of the contract, and in fulfillment of its conditions—every act pointing in the same direction—is properly admissible in evidence. And the rule embraces acts subsequent to the date of the contract, and includes deeds and instruments under seal.—*St. Louis Gaslight Co. v. The City of St. Louis*, 121.
4. *City ordinances, designed for a city at large, apply to its enlarged boundaries.*—A city ordinance, or a city contract designed for a city at large, operates throughout its boundaries, whatever their change.—*Id.*
5. *St. Louis Gas Company—Contract for gas—Gas furnished St. Louis in extended limits—Estoppel.*—In suit by the St. Louis Gaslight Company against the city of St. Louis, for amount claimed as due for gas furnished defendant in its enlarged boundaries, where it appeared that without dispute, and for a long series of years, plaintiff had claimed and exercised, and been supported in, the exclusive right of occupying, under a certain contract, the new as well as old city limits, *held*, that it should be estopped from seeking to limit its operation for the purposes of the suit.—*Id.*
6. *Damages—Covenant against encumbrances—Evidence—Assessment of damages.*—A corporation having purchased certain lands encumbered with leasehold, had them condemned, and the damages to the lessees were assessed in court. Action afterward being brought against the vendor on his covenant against encumbrances, it appeared that, although not technically a party to the record in the proceedings for assessment of damages, he had been duly notified, and had ample opportunity to appear and defend his interests. *Held*, that the judgment assessing the damages was properly admissible in evidence.—*The City of St. Louis v. Bissell*, 157.
7. *Damages—Eminent domain—Covenant against encumbrances, measure of damages in action on.*—For a breach of the covenant of seizin, the measure of damages is the consideration given and received. But the damages for the breach of a covenant against encumbrances depends upon the value of the encumbrance, without reference to the value of the land or the purchase money. The covenantee is entitled to recover what he has paid to extinguish the encumbrance, if he has paid a reasonable and fair price. (*Henderson v. Henderson*, 13 Mo. 161, affirmed.)—*Id.*
8. *Contracts—Purchase by minor child must be shown to be made by child as agent of father—Subsequent ratification of itself not sufficient.*—A father can not be held liable for a purchase made by his minor son, on the sole ground of a supposed subsequent ratification of the purchase and a promise to pay the purchase money. The father can be held only on the ground that he authorized the purchase, either expressly or by implication. Whether or not there was such authority is a matter for the jury, and not for the court. The fact of the subsequent ratification and promise is legitimate and persuasive evidence, from which the jury may find that the purchase was made



**CONTRACTS—(Continued.)**

- by the son as the father's agent, acting under authority either express or implied. But the moral obligation of the father to support his child does not make him legally liable to pay his child's debts. And to charge a father on his son's contracts, the same circumstances must be shown as to charge an uncle, a brother, or any third person.—*Holt v. Baldwin*, 265.
9. *Contracts—Subscription—Labor and expense sufficient consideration for.*—Labor performed and money spent to secure the location of a railroad depot are sufficient consideration to support a promise contained in subscription to pay money for that object.—*Workman v. Campbell*, 305.
  10. *Contracts—Consideration, legality of—Depot, location of—Railroad company.*—A contract to pay a given sum of money to one who should present a petition or proposition to the directors of a railroad company for the location of the depot on certain land, the money to be paid on location of the depot and completion of the road, is not void as against public policy unless it appear that sinister, extraneous, or corrupting influences were brought to bear on the company to superinduce the location.—*Id.*
  11. *Contract—Part performance—Measure of damages.*—Where a vendor has failed wholly to comply with his part of the contract, yet if the vendee has received and made use of part of the property purchased, and is benefited by it, he must still pay for the property so received and used, the value, not to exceed the contract price, if that value exceed the damage he has sustained by reason of the failure to complete the contract. In such cases the party injured is compensated in damages; and when the vendor agrees to sell and deliver personal property at or within a particular time, and fails to perform his contract, the measure of damages is the difference between the contract price and the market value at the time it should have been delivered.—*Koeltz v. Bleckman*, 320.
  12. *Contracts—Sale of lands—Specific performance—Equity.*—A., in order to befriend B., permitted him to occupy one of his lots, and furnished him with lumber to build a small house upon it, with a verbal understanding that he would make a title if he received his pay. B. became insolvent, and failed to pay. The property was sold under execution and bought in by A., to whom the possession was surrendered by B. A. remained in undisputed possession afterward. Four years subsequently, on an execution against B., his interest in the premises was levied on and sold; and C. being the purchaser, brought his bill for specific performance against A. *Held*, that C. had no claim to the property, even though the first execution sale were invalid.—*Burke v. Seeley*, 334.
  13. *Specific performance, bills for.*—Bills for specific performance appeal to the conscience and discretion of the court.—*Id.*
  14. *Contracts—Judgment—Agreement to purchase—Release of judgment lien, effect of—Separation of judgment into parts.*—In a suit on a written agreement to pay a certain sum for an assigned judgment, where there was no allegation of fraud, and the case was made to turn simply upon the existence or non-existence of a consideration for defendant's promise, *held*, that the judgment being a valid and binding one, its transfer was a sufficient consideration for the agreement, although it appeared that prior to the transfer the assignor had released the lien of the judgment on certain real estate. And the fact that the agreement embodied an arrangement that defendant was to

## CONTRACTS—(Continued.)

pay a certain proportion and other assignees the remainder, would not constitute an assignment of the judgment in parts.—*State National Bank of St. Joseph v. Walser*, 348.

15. *Contracts, executory, of married women, not absolutely void.*—The executory contracts of a married woman are not absolutely void. They are valid in equity when made on the credit or for the benefit of her separate estate.—*Bruner v. Wheaton*, 363.

16. *Contracts—Proposal, acceptance of, constitutes a binding contract, when.*—In order that an acceptance of a proposition may be operative it must be unequivocal, unconditional, and without variance of any sort between it and the proposal, and it must be communicated to the other party without unreasonable delay.

An absolute acceptance of a proposal, coupled with any qualification or condition, will not be regarded as a complete contract, because there at no time exists the requisite mutual assent to the same thing in the same sense.—*Id.*

17. *Contracts, interpretation.*—In the interpretation of contracts it is a just principle of construction, both morally and legally, that the promisor is bound according to the sense in which he apprehended that the promisee received the proposition.

In construing a contract for the sale of land, in the absence of special words or circumstances indicating a different intent, a stipulation "for immediate payment" or "payment down" will be held to mean payment at the time the deed is made out and executed.—*Id.*

18. *Bonds—Person named in body of, not signing—Effect as to release of signers.*—Those signing a bond will be bound by it, notwithstanding the fact that another person named in the instrument had failed to sign it, unless it appear that at the time of its execution it was agreed that it should not be delivered as their deed until all had executed it.—*State ex rel. Moore v. Sandusky*, 377.

19. *Bonds—Penalty—Damages greater than, not recoverable.*—The general principle is that in actions upon penal bonds with collateral conditions, the plaintiff can never recover more in the shape of damages than the penalty, even where the damages exceed the amount of the penalty; nor in such case can interest be recovered even on the penalty, after happening of the breach, if the penalty be not then paid. But under the statute (*Wagn. Stat.* 240, § 8) he may in addition have costs which accrued in prosecution of his suit on the bond.—*Id.*

20. *Bonds, penal—Sureties, liabilities of can not be extended by implication.*—The liability of a surety on a bond can not be extended by implication beyond the terms of his contract. To the extent and in the manner and under the circumstances pointed out in his obligation, he is bound, and no further.—*Id.*

21. *Contracts—Private sale by sheriff, under order of County Court, invalid, and may be disproved by parol evidence.*—A sale of land by the sheriff, under order of a County Court, at private sale, is invalid; and it is immaterial that the order did not require a public sale. The sheriff is imperatively controlled by the requirements of the statute (*Wagn. Stat.* 867, § 3).

And when, in suit against a county for specific performance of the contract

**CONTRACTS—(Continued.)**

of sale, it appeared from the certificate of sale by the sheriff that the land was sold at public auction, the county is not conclusively bound by the said recitals, but may show by evidence that in fact such sale was a private one. —*Hutchinson v. Cassidy*, 431.

22. *Contracts — Lex fori governs questions affecting the remedy.*—The *lex fori* decides all questions which pertain to the remedy only, and not to the contract. —*Carson v. Hunter*, 467.

23. *Bills and notes — Proclamation of August, 1861 — Note given for slaves taken to States in insurrection, without consideration.*—A note given for the purchase of negroes taken into the States in insurrection, without special license, during the late war, and after the proclamation of the President, of August 16, 1861, had no legal consideration and could not be collected. —*Id.*

24. *Ejectment — Sub-letting — Rescission — Rents and profits, testimony as to.*—Under an agreement between A. and B. for the sale of certain premises then in litigation, the deed was not to be required till the title was quieted, but B. was to have immediate possession, with full power to act in all things as if he had the absolute conveyance, taking to his own use the rents, issues, and profits. B. went into possession and sub-let to C. In ejectment by A. against C., *held*, that an application of A. for rescission of the contract by mutual consent was not a rescission, nor did it imply any breach or abandonment of the contract on the part of B.; and that, while his rights in the premises continued under the agreement, rents were properly paid to him by C., and could not be again recovered from C., and that testimony showing payment of money for rents and repairs by C. during that time was proper. —*Picot v. Douglass*, 497.

25. *Contract — Agency — Real estate broker — Variance — What will not vitiate a contract.*—A real estate broker having contracted with the owner of a farm to sell it at a specified commission, proceeded to advertise, etc., and procured a buyer and brought him to the farm. But the latter objecting to the quantity of land offered, the owner agreed to reserve a portion and sell him only the remainder, whereupon the parties repaired to the office of the broker, who drew up the papers, and did other things in aid of the vendor, and the sale was consummated. In all things connected with the sale the broker fulfilled his contract, so far as permitted by the owner. *Held*, that the sale, being of a part instead of the whole farm, under that state of facts, was not such a variance with the written contract as to prevent the broker from recovering the full amount of the commission upon the land actually sold. The change in the terms of sale, in the particular mentioned, became a part of the original contract, and could be enforced as such. —*Woods v. Stephens*, 555.

See **BILLS AND NOTES. CONVEYANCES. EVIDENCE, 17. HUSBAND AND WIFE, 5, 10, 13 14. INSURANCE, FIRE AND MARINE. REVENUE, 4. SURETY, 3.**

**CONVEYANCES.**

1. *Husband and wife — What words necessary to create an estate in the wife* —No special or technical words are required to create in the wife a separate estate; but any provision that negatives or excludes the marital rights of the husband, while giving the property to the use of the wife, should be held to create in her a separate estate. Though the words "separate use" or "sole use" are usually employed, yet if the same intention is clearly expressed by

## CONVEYANCES—(Continued.)

other terms or promises of the instrument, such words are not necessary.—*Boal, Adm'r of Dugan, v. Morgner, 48.*

2. *Conveyances—Married women—Acknowledgments—Justice of the peace act, 1855.*—Under the act of 1855 (R. C. 1855, p. 363, § 37) a justice of the peace had authority to take the acknowledgment of a married woman to a deed conveying her own real estate. (*West v. Best, 28 Mo. 551, overruled.*)—*Mitchell v. Peoples, 203.*
3. *Conveyances—Recorded deed by heirs will give title as against unrecorded deed of deceased grantor.*—The heirs of a grantor in an unrecorded deed of land, on his death become the apparent owners of the legal title, and a duly recorded conveyance by them of the same estate to an innocent purchaser will carry the title as against the first grantee, in like manner as if made by the ancestor.—*Youngblood, Adm'r of Tuley, v. Vastine, Adm'r of Wright, 239.*
4. *Ejectment—Executions—Sheriff's amendment of return allowed, when.*—The return upon an execution omitted to describe the real estate sold, but the sheriff's deed conveying the land described it minutely. In ejectment brought many years afterward against the original defendants in execution, *held*, that the sheriff not being dependent on his memory, but being furnished by the deed with the means of accurately supplying the defects, might amend his return so as to make it show what lands were sold and who was the purchaser. And this he might do although out of office; but *semble*, that the case would be otherwise where the rights of innocent purchasers might be affected. The suit being instituted long after the date of the return, the court properly refused to permit defendants to examine the sheriff as to his personal recollection of the facts of his return.  
There is no limitation of time within which amendments of this class must be made, although after the lapse of years the court should grant applications with great caution; and the granting of them rests in the sound discretion of the court, and not as a matter of right. To be entitled to amend, the party should show the fact of a mistake beyond a reasonable doubt.—*Scruggs v. Scruggs, 272.*
5. *Conveyances—Alterations in by grantee do not invalidate title.*—An alteration in a conveyance after delivery does not operate to reconvey the title to the original grantor. The title passes by the deed, and its continued existence or integrity is not essential thereto, although a fraudulent and material change may disable the holder from bringing an action upon its covenant.—*Woods v. Hilderbrand, 234.*
6. *Conveyances—Improper acknowledgment—Actual and constructive notice.*—Where a recorded instrument shows upon its face that the acknowledgment was taken by a party in interest, it is improperly recorded, and is no constructive notice; but when it is fair upon its face, it is the duty of the register to receive and record it, and its record operates as notice notwithstanding that there may be some hidden defect. Yet a conveyance, though improperly acknowledged, is good as between the parties or those purchasing with actual notice.—*Stevens v. Hampton, 404.*
7. *Bills and notes—Misdescription, what does not amount to.*—The fact that a deed of trust purported to be given to secure a promissory note due the beneficiary, whereas in truth it was given to indemnify him as surety upon a



## CONVEYANCES—(Continued.)

note to a third person, does not amount to such a misdescription as should affect the validity of the deed.—*Id.*

8. *Deed properly recorded imparts notice, although not indexed.*—A deed properly filed and copied of the record, is recorded within the meaning of the law (R. C. 1855, p. 1314, §§ 13, 14; Wagn. Stat. 1141, §§ 12, 13), and imparts notice to subsequent purchasers, notwithstanding the failure of the officer to index it. The index is no part of the record.

The recorder is liable to the party aggrieved for double the amount of damages sustained by reason of the failure of the officer to index the deed. But *semble*, that it must appear that his damage arose from such neglect of the recorder, not from other causes, such as, *e. g.*, his own reliance upon false outside representations as to title without an examination of the index, or from his mistaken reliance upon the covenants of his grantor, independent of the matter of notice.—*Bishop v. Schneider*, 472.

9. *Deed improperly acknowledged imparts no notice.*—Where it is provided by the statute that, in order to the registration of a conveyance, it shall be acknowledged before some officer, and a certificate thereof entered upon the deed, if the same be recorded without the prescribed acknowledgment, the recording will not be constructive notice to any one.—*Id.*

10. *Justice of the peace in one county can not certify acknowledgment of deed conveying land in another county.*—A justice of the peace in one county has no authority to take and certify the acknowledgment of an instrument conveying lands in another county. (R. C. 1855, p. 358; § 17, p. 365, §§ 40-1; Wagn. Stat. 274, § 9, p. 277, §§ 24-5.) Such an acknowledgment is a nullity, and the deed, although recorded, imparts no notice.—*Id.*

11. *Conveyances—Defective acknowledgments—Act of 1855 touching, does not cure subjective acknowledgments.*—The statute concerning evidence (R. C. 1855, p. 731, § 46; Wagn. Stat. 595, § 35), providing that conveyances made theretofore, and unacknowledged, or defectively acknowledged, should impart notice, was intended to apply exclusively and solely to conveyances made prior to the taking effect of the code of 1855. That statute derives no additional force or power from being found in the statutes of 1865. Its republication must be construed as a continuation of the old law, and not as a new enactment. (Wagn. Stat. 897, § 5.) Hence, when a defectively acknowledged mortgage was made after the adoption of the Revised Code of 1855, it does not come within the saving clause of that enactment, and imparted no notice.—*Id.*

12. *Conveyances—Defective acknowledgments can only be taken advantage of by a purchaser for value.*—A defective acknowledgment can only be taken advantage of by a purchaser for a valuable consideration. In all cases the purchaser must show that he paid the purchase money before he is entitled to relief on account of not having any notice.—*Id.*

13. *Conveyances—Act December 12, 1855—Defective acknowledgments subsequent to, impart notice.*—A private deed, although defectively acknowledged, or even not acknowledged at all, is good between the parties and against subsequent purchasers with notice; and under our statute (Wagn. Stat. 595, §§ 35, 36), the record of such a deed prior to December 12, 1855, would impart constructive notice. (*Stevens v. Hampton*, *ante*, p. 404; *Bishop v. Schneider*, *ante*, p. 472.) But a sheriff's deed under an execution sale, if defectively



**CONVEYANCES—(Continued.)**

acknowledged, conveys no title. The property is conveyed against his will. The conveyance is not his act, but that of the law, and the law must be strictly complied with.

And such deeds are not validated by sections 35 and 36, *supra*. The sole object of these sections was to cure defective acknowledgments of conveyances in themselves good. And they can not apply to a sheriff's deed, for the reason that a legal acknowledgment is essential to the validity of the deed itself.—*Ryan v. Carr*, 483.

See **CONTRACTS**, 6, 7. **EQUITY**, 10. **FRAUDULENT CONVEYANCES**. **HUSBAND AND WIFE**, 11, 16. **LANDS AND LAND TITLES**, 4. **SALES**.

**CORPORATIONS.**

1. *Corporations—Transfer of stock—Action at law, and not mandamus, the proper remedy.*—Where a corporation improperly refuses to transfer stock on its books, the party injured has an ample remedy by an action at law for the market value of the stocks, and *mandamus* to compel such transfer will not lie.—*State ex rel. Bornefeld v. Rombsauer*, 155.

2. *Insurance company—Judgment against, prima facie evidence of its corporate existence.*—For the purpose of a motion against the stockholders of an insurance company, a judgment against the company is *prima facie* evidence of its corporate existence at the time the judgment was rendered. If the stockholder would resist his liability as such on the ground of irregularities in the organization of the company, or on the ground of deficiencies therein, he should point them out and make some proof of them.—*Schaeffer v. Missouri Home Ins. Co.*, 248.

3. *Insurance company—Subscription makes subscriber stockholder, though he fails to meet subsequent calls—Subscription fraudulently obtained, not necessarily void.*—The subscription for shares of stock in an insurance company made the subscriber a stockholder of the company, although he failed to meet the subsequent calls thereon; and it made no difference that certificates of stock were not in fact issued. And a subscription for stock fraudulently and collusively obtained is not necessarily void. Notwithstanding the fraud or collusion, the law will hold the parties bound by their subscriptions, and under obligations to comply with all the terms and responsibilities imposed upon them thereby.—*Id.*

4. *Towns and cities—Unincorporated towns—School districts.*—Under section 1, article II, of the act relating to schools (*Wagn. Stat.* 1262) an unincorporated town is not legally organized as a school district, and subsequent legislation, explanatory of the meaning of that section, can not retroact so as to alter the previous rights of parties under this law.—*McManning v. Farrar*, 376.

See **DAMAGES**, 6. **RAILROADS**, 1. **ST. LOUIS, CITY OF**.

**COUNTER-CLAIM.**

See **SET-OFF**.

**COUNTY SEATS.**

1. *County seat—Seat of justice must be within the limit originally selected.*—The seat of justice in a county is the place originally selected in pursuance of law, and can not be subsequently removed to a site within the extended town limits. An addition to a county seat is not the established seat of justice within the purview of the statute.

## COUNTY SEATS—(Continued.)

Did such power of removal exist, the exercise of it by the County Court would be discretionary and its action final.—*State ex rel. Norman v. Smith*, 60.

## COURTS, COURTS.

1. *Administration*—*Will annexed, public administrator with, ordered to sell under will, can not be compelled to give deed by County Court.*—A public administrator, with the will annexed, was directed, under the will, to sell the real estate of the testator for a specified object not connected with the administration. Suit being brought in the County Court to compel him to execute a deed for the land to the purchaser, *held* as follows: 1st. County Courts exercising probate functions, although a branch of the State judiciary, have only such power and jurisdiction as are conferred on them by the statute. 2d. The act investing them with probate jurisdiction (1 Wagn. Stat. 440, § 7) does not clothe them with jurisdiction of such a proceeding. Where the authority of the administrator to sell is derived from the statute, he acts in obedience to the orders of the court, and is subject to its control, and the court possesses full supervisory power and jurisdiction in all matters touching the premises, as in compelling him to make a deed to the purchaser; but where a specific power to sell is conferred by will, and does not exist in consequence of any statute, the rule is otherwise, and the County Court can not entertain jurisdiction. The fact that the statute designates the administrator as the proper person to execute the power of sale, does not give it jurisdiction over the subject-matter. In the case cited relief should be sought in a court of chancery, and not in the County Court.—*Coil v. Pitman's Adm'r*, 51.
2. *Jurisdiction not given County Court by implication.*—Where the statute has not clearly devolved jurisdiction on the County Court, it can not be given by implication.—*Id.*
3. *Certiorari*—*Entry of allowance or rejection of claim by County Court not reviewable on certiorari.*—The auditing of a demand against the county by a County Court is not a judicial proceeding, and the entry of its allowance or rejection is not a judgment; and, not being a judgment, can not be reviewed in an appellate court on *certiorari*. If a specific claim be rejected, the county may be sued upon it, and its rejection is no *res adjudicata*.—*Phelps County v. Bishop*, 68.
4. *County Court should not allow claims not warranted by law.*—County Courts have no right to allow claims not warranted by law.—*Id.*
5. *Wills*—*County Courts*—*No direct appeal from in matters of probate.*—A County Court, where there is no Probate Court, under section 7, chapter 137, Gen. Stat. 1865, has exclusive jurisdiction of all questions relative to the admission of wills to probate, and from its decision therein there is no direct appeal. Subdivision 2, section 2, chapter 136, Gen. Stat. 1865, can not be applied to County Courts as courts of probate, in the absence of express provision elsewhere in the statute touching such appeals. The appellate jurisdiction of the Circuit Court in matters of probate has been uniformly referred to the provisions of the statute as now embraced in section 1, chapter 127, Gen. Stat. 1865; and the closing paragraph of that section, providing for appeal "in all other cases \* \* \* under this law," construed in connection with section 1, chapter 2, p. 174, R. C. 1855, does not embrace the subject of wills or their probate.—*Kenrick v. Cole*, 85.

## COURTS, COUNTY—(Continued.)

6. *Wills — County Court — Orders of, touching wills, not specifying who shall receive property devised — Effect of.*—An order of a County Court touching a probate estate, which does not specify who individually are to receive the property devised, but simply announces that the property shall go to the next of kin, is not an order of distribution or apportionment within the meaning of the third subdivision of section 1, chapter 127, Gen. Stat. 1865.—*Id.*
7. *County Courts — Powers — County warrants — Absconding treasurer.*—Although a County Court is endowed with large discretion in the management of its affairs, it has no authority to order the issue of a county warrant for amounts of money expended by the sureties of a defaulting and absconding county treasurer in bringing him back, even though they obtained from him a large proportion of the amount in arrears, where it further appears that the sureties were amply good for the deficit, and that there was no reason to suppose that he took with him any of the property of the county in specie. Such action of the court would not be in behalf of the county, but of the signers of the bond alone. And it would not affect their claim, that one of the judges had advised the step and assured them of his influence with the remaining judge to secure the issue of the warrant. Such a case would not be one of the injudicious exercise of a given power, but a naked assumption of power, in no wise granted, which it would be the duty of courts to check.—*Hooper v. Ely*, 505.

See COUNTY SEATS, 1.

## COURTS, DISTRICT.

See PRACTICE, CIVIL—APPEALS, 10.

## COURT, ST. LOUIS CIRCUIT.

See PRACTICE, CIVIL—APPEALS, 2—TRIALS, 2.

## COVENANTS.

See CONTRACTS, 6, 7.

## CRIMES AND PUNISHMENTS.

1. *Crimes and punishments — Horse-race not gambling device.*—A horse-race is not a gambling device within the meaning of the act concerning crimes and punishments (Wagn. Stat. 502, §§ 17, 18). (*State v. Hayden*, 81 Mo. 35, affirmed.)—*State v. Lemon*, 375.

See PRACTICE, CRIMINAL.

## CRIMINAL LAW.

See CRIMES AND PUNISHMENTS—PRACTICE, CRIMINAL.

## CROPS.

See LANDLORD AND TENANT, 1. REPLEVIN, 1.

## D

## DAMAGES.

1. *Damages — Covenant against encumbrances — Evidence — Assessment of damages.*—A corporation having purchased certain lands encumbered with leasehold, had them condemned, and the damages to the lessees were assessed in court. Action afterward being brought against the vendor on his covenant against encumbrances, it appeared that, although not technically a party to

**DAMAGES—(Continued.)**

the record in the proceedings for assessment of damages, he had been duly notified, and had ample opportunity to appear and defend his interests. *Held*, that the judgment assessing the damages was properly admissible in evidence. —*The City of St. Louis v. Bissell*, 157.

2. *Damages—Eminent domain—Covenant against encumbrances, measure of damages in action on.*—For a breach of the covenant of seizin, the measure of damages is the consideration given and received. But the damages for the breach of a covenant against encumbrances depends upon the value of the encumbrance, without reference to the value of the land or the purchase money. The covenantee is entitled to recover what he has paid to extinguish the encumbrance, if he has paid a reasonable and fair price. (*Henderson v. Henderson*, 13 Mo. 161, affirmed.)—*Id.*

3. *Corporations—Railroad—Negligence—Machinery, failure to adopt proper—Employees responsible for consequences.*—Where injuries to servants or workmen happen through the negligence, misfeasance, or misconduct of a fellow-servant, no action therefor can be maintained against the master unless the fellow-servant is not possessed of ordinary skill and capacity in the business intrusted to him, and unless his employment is attributable to the want of ordinary care on the part of the master. But where such injuries are owing to improper or defective machinery or appliances used in the prosecution of the work—the condition of which, by reasonable and ordinary care and prudence, the master might know—and not to the lack of care and prudence in the employees, the rule is otherwise, and the master would be liable. The legal implication is that the employer will adopt suitable instruments and means with which to carry on his business. If he fails to do so, he is guilty of a breach of duty under his contract, for the consequences of which, in justice and sound reason, he ought to be responsible. —*Gibson v. Pacific R.R. Co.*, 163.

4. *Contract—Part performance—Measure of damages.*—Where a vendor has failed wholly to comply with his part of the contract, yet if the vendee has received and made use of part of the property purchased, and is benefited by it, he must still pay for the property so received and used, the value, not to exceed the contract price, if that value exceed the damage he has sustained by reason of the failure to complete the contract. In such cases the party injured is compensated in damages; and when the vendor agrees to sell and deliver personal property within a particular time, and fails to perform his contract, the measure of damages is the difference between the contract price and the market value at the time it should have been delivered.—*Koeltz v. Bleckman*, 320.

5. *Bonds—Penalty—Damages greater than, not recoverable.*—The general principle is that in actions upon penal bonds with collateral conditions, the plaintiff can never recover more in the shape of damages than the penalty, even where the damages exceed the amount of the penalty; nor in such case can interest be recovered even on the penalty, after happening of the breach, if the penalty be not then paid. But under the statute (*Wagn. Stat.* 240, § 8) he may in addition have costs which accrued in prosecution of his suit on the bond.—*State ex rel. Moore v. Sandusky*, 377.

6. *Corporations—Railroad companies—Negligence, what prima facie case of.*—The fact that the fire which caused the damage sued for was set by a



**DAMAGES—(Continued.)**

railroad engine would be *prima facie* evidence of negligence by those who ran it, or who provided the engine with its contrivances, and would throw the burden of exonerating them upon the company.—*Bedford v. Hann. and St. Jo. R.R. Co.*, 456.

See **BANKS AND BANKING**, 3. **CONVEYANCES**, 5. **EXCAVATIONS**, 1. **PRACTICE**, **SUPREME COURT**, 6. **RAILROADS**, 1.

**DEMAND.**

See **BILLS AND NOTES**.

**DEPOSITIONS.**

See **EVIDENCE**.

**DOWER.**

1. *Dower — Mortgage — Relinquishment of dower in payment of mortgage by assignee before foreclosure, out of money of husband — Wife's claim for dower.*—Where the grantee of land gives a mortgage to secure payment of the purchase money, his wife relinquishing her dower therein; and afterward the husband's assignee, during his lifetime, sells his property, including the land encumbered, and, with the money derived from the sales, pays off the encumbrance before foreclosure of the mortgage, the wife will not be barred of her dower in the estate.

The general principle is that where the husband dies leaving encumbered real estate, the widow takes her interest therein, if at all, charged with the encumbrance; and if any one interested in the estate—as heir or purchaser—discharges or redeems the encumbrance, he thereby acquires an equitable lien on the estate which he may hold against the widow till she contributes her proportion of the charge, according to the value of her interest. But the principle can not apply to the case supposed, for there payment would be in effect payment by the husband, and would operate as a complete annihilation and extinguishment of the encumbrance; and it is immaterial that in such case the purchase money may have gone toward payment of the encumbrance.—*Atkinson v. Stewart*, 510.

2. *Dower — Mortgage, payment of by purchaser of equity of redemption — Effect regarding claim for dower.*—Although there may be some cases where the purchaser of an equity of redemption, by paying the mortgage debt and taking an assignment of the mortgage, can protect himself against a demand for dower by the widow of the mortgagor—she having relinquished her dower in the deed—so that she will only be allowed to come in by proceeding in equity, and contributing her proportionate share toward the extinguishment of the legal charge; yet where the purchaser, without taking an assignment, and without any attempt to keep the mortgage alive, pays off the encumbrance absolutely and unqualifiedly, and no mistake was alleged or pretended in the cancellation or entry of satisfaction, it would be effectually dead, and the widow's relinquishment of dower being destroyed with it, her right of dower would remain in full force. The doctrine of subrogation can not apply to such cases; and it makes no difference that the purchaser was advised and supposed that a discharge of the mortgage would be equally beneficial to him as an assignment.—*Atkinson v. Angert*, 515.

**DURESS.**

See **PRACTICE, CRIMINAL**, 15.



## E

## EJECTMENT.

See LANDS AND LAND TITLES, 6. MORTGAGES AND DEEDS OF TRUST, 4.

## ELECTIONS.

1. *Elections*—Section 18 of act of 1868, touching registration, constitutional.—Section 18 of the act touching registration of voters (Sess. Acts 1868, p. 186) is not in conflict with the State constitution in any of the following particulars:

1. Its subject-matter is sufficiently pointed out and expressed in the title of the act, under section 82, article IV, of the constitution.

2. Its requirement of a supplemental registration to meet the exigency of a special election, is not at variance with the uniformity of registration required by section 4, article II, of the constitution.

3. It is not in conflict with said section 4, article II, as making such special registration evidence of the right to vote.

4. It is not unconstitutional on the ground that the neglect of duty on the part of the board of registration might practically work a disfranchisement of voters registered at the regular biennial registration.

5. It is not in conflict with section 4, article II, because it allows said board up to five, instead of ten days before the election within which to complete the books of registration, unless the "completion of the books" be held to authorize a continued registration of votes down to within five days of the election, and unless it appear that persons cast their votes within the ten days. Even if the act expressly authorized the continuance of the registration to within five days, that would not vitiate the whole enactment, but only that particular part of it.—*Ensworth v. Albin*, 450.

2. *Elections*—*Votes for candidates who have not filed the candidates' oath*.—Votes cast for a candidate who has neglected to take and file the oath of loyalty prescribed by the constitution, are nugatory. The constitution distinctly prohibits their being cast up or treated as votes all.—*State ex rel. Kempf v. Boal*, 528.

## EQUITY.

1. *Equity*—*Chancery proceedings by attaching creditor, to set aside sale under judgment and execution*—Not necessary always to exhaust legal remedies prior thereto.—Generally speaking, a mere creditor (and he may be an attachment creditor who has not obtained a judgment) can not ask the interposition of a court of equity to set aside an execution sale of land under another judgment against the same person. He must first exhaust his legal remedies, and this is usually done by obtaining judgment and execution, with return of *nulla bona*. But where it is shown that the judgment debtor is insolvent, and that the issue of an execution would be of no practical utility, its issue may be dispensed with, and the attaching creditor may resort directly to chancery for his remedy against such judgment creditor, without such prior proceedings.—*Turner v. Adams*, 95.

2. *Sheriff's sale*—*Imposture at, title under worthless*.—The title of a purchaser at a sheriff's sale, who practices any deceit or imposture, or who is guilty of any trick or device, the object of which is to get the property at an under-value, is void and utterly worthless.—*Id.*

## EQUITY—(Continued.)

3. *Equity—Husband and wife—Contracts between, when valid.*—A contract between husband and wife will be held good in equity, as a general rule, when it would be valid and binding at law if made with trustees of the wife for her benefit. And in equity, the intervention of trustees is not an indispensable prerequisite to the validity of the contract.—*Tennison v. Tennison*, 77.
4. *Husband and wife—Equity—Property acquired by husband to be used for benefit of wife—Husband will be treated as trustee.*—Where a husband received funds, not for the purpose of appropriating them to his own use, but expressly and by positive agreement for the benefit of his wife, and to be appropriated to her sole and separate use, and afterward made the contemplated purchase in his own name, equity will treat him as holding the title as trustee for his wife.—*Id.*
5. *Married women—Separate estate of, subjected to payment of their separate debts.*—A *femme sole* may acquire by purchase as well as by gift a separate estate, and that, too, through a deed directly to herself, without the intervention of trustees; and such separate estate will be protected in equity against the marital rights of an after-taken husband who shall acquiesce in the arrangement and allow his wife to manage and control the property as her own, notwithstanding such marriage. Equity will also subject such estate to the payment of her debts and obligations. Where she joins in the execution of a note, it will be inferred, *prima facie*, that she intended thereby to charge her separate estate. Equity will protect the separate interests of a married woman against the claims of her husband and his creditors, but will subject such property to the payment of her own debts.—*Schafroth, Adm'r, v. Amb*s, 114.
6. *Married women—Separate estate of, charged by direct proceedings in chancery.*—Where a married woman joins her husband in the execution of a note, the first and only method of charging her separate estate for the debt is a resort to chancery. The jurisdiction of chancery in such a case is in no way dependent upon antecedent legal proceedings against her husband, or those of any kind whatever.—*Id.*
7. *Contracts—Sale of lands—Specific performance—Equity.*—A., in order to befriend B., permitted him to occupy one of his lots, and furnished him with lumber to build a small house upon it, with a verbal understanding that he would make a title if he received his pay. B. became insolvent, and failed to pay. The property was sold under execution and bought in by A., to whom the possession was surrendered by B. A. remained in undisputed possession afterward. Four years subsequently, on an execution against B., his interest in the premises was levied on and sold; and C. being the purchaser, brought his bill for specific performance against A. *Held*, that C. had no claim to the property, even though the first execution sale were invalid.—*Burke v. Seeley*, 334.
8. *Specific performance, bills for.*—Bills for specific performance appeal to the conscience and discretion of the court.—*Id.*
9. *Equity—Purchase by trustee with money of cestui que trust—Action to divest title—Parol proof.*—A trust will ordinarily result in favor of one whose money is used by another in the purchase of land, where the conveyance is taken to himself instead of the person who furnished the money, and the facts which create the trust may be proved by parol; but such evidence

**EQUITY—(Continued.)**

must be clear and unequivocal, and not merely preponderating. There should be no room for reasonable doubt as to the facts relied upon.—*Johnson v. Quarles*, 423.

10. *Equity—Husband and wife—Voluntary assignment by an insolvent, of demande due himself, to his wife.*—Where a husband causes certain promissory notes, the consideration of which moved from himself alone, to be made payable to the order of his wife, the act will be regarded as a voluntary assignment or transfer of the claim to her without consideration; and if the husband is then insolvent, and such conveyance was made with intent to hinder, delay, and defraud creditors, it would be, for that reason, utterly void as to them.—*Reppy v. Reppy*, 571.

11. *Equity—Offset—Set-off or counter-claim.*—In regard to a set-off or counter-claim, equity usually follows the law, but not always. When an insolvent plaintiff is suing, equity will take jurisdiction of unliquidated claims, and allow offsets which would not be allowed in law. But a demand can not be set off any more in equity than in law, unless it existed against the plaintiff, in favor of the defendant, at the time of the commencement of the suit, and had then become due.—*Id.*

See HUSBAND AND WIFE, 5, 6. INJUNCTION. LANDS AND LAND TITLES,

7. MORTGAGES AND DEEDS OF TRUST, 1. PARTNERSHIP. REVENUE, 6. SALES, 1.

**ESTOPPEL.**

1. *Estoppel in pais—Admissions—Directions.*—One is estopped from denying the right of another to do an act which was done under his direction, where an injury would result to the other from allowing the right to be disproved. There is no difference between estoppel by admission and direction, only that in the latter case the injustice of holding the party doing an act responsible to the person whose directions are followed, is even more apparent than in the former.—*Bunce, Adm'r of Beck, v. Beck, Ex'r of Beck*, 327.

**EVIDENCE.**

1. *Evidence—Draft—Testimony of bank cashier—Res gestæ.*—Where a draft sued on was held in bank by the cashier contrary to the usual mode of dealing with such paper, it is perfectly legitimate, as a part of the *res gestæ*, to give the declarations of the cashier concerning the paper, its object and character, and the relation of the drawer to him and the bank, so far as it throws light on the paper, while it was being so held.—*National Bank of the Metropolis v. Williams*, 17.
2. *Contracts—Latent ambiguity—In contract of doubtful meaning, construction of, as shown by continued conduct of parties, should prevail over that given by court.*—In the use of words of doubtful meaning or application, the meaning and application given by the parties who used them should prevail over an interpretation that might otherwise be given by the court. In the interpretation of contracts of this sort, regard should not be had to loose declarations, or equivocal or isolated acts; but the continuous conduct of the parties for a series of years concerning the subject-matter of the contract, and in fulfillment of its conditions—every act pointing in the same direction—is properly admissible in evidence. And the rule embraces acts subsequent to the date of the contract, and includes deeds and instruments under seal.—*St. Louis Gaslight Co. v. The City of St. Louis*, 121.

## EVIDENCE—(Continued.)

3. *Judgments of sister States conclusive evidence of what.*—Judgments rendered in other States are not treated as foreign; and though they are not so far domestic that they can be enforced without a new judgment, they are conclusive of everything except jurisdiction over the parties or the subject-matter; and where the service on defendant was good according to the laws of the State where the judgment was obtained, the court of that State would obtain jurisdiction of defendant's person, and the judgment would be at least *prima facie* evidence of the indebtedness sued on.—*Barney v. White*, 187.
4. *Evidence—Depositions—Objections to form of testimony must be made, when.*—Under the rules of the St. Louis Circuit Court, objections to the form of questions propounded to witnesses in the taking of depositions must be taken on the examination, or they will be treated as waived. The statute relating to depositions (Wagn. Stat. 528, § 30) does not affect the rule. The "competency and relevancy" therein referred to point to the substance of the testimony sought to be elicited, and not to the mere form of the question.—*Fox v. Webster*, 181.
5. *Witnesses—Impeachment—Time, place, and circumstance.*—All that is necessary to contradict a witness, by showing that at some other time he has said something inconsistent with his present evidence, is to ask him questions as to the time, place, and person involved in the supposed contradiction. The rule is simply for the protection of the witness, to give him an opportunity to recollect the facts and correct the statements when immediately brought to his mind. And the evidence touching the conversation ought not to be excluded solely on the ground that it took place after the institution of the suit.—*Spaunhorst v. Link*, 197.
6. *Practice, criminal—Sanity—Evidence—Testimony of experts, when improper.*—In a murder trial, counsel for defendant put to a medical expert the following question: "When the defendant has been undeniably subject to fits of epilepsy, should he not have the benefit of every reasonable doubt that might arise as to his sanity?" *Held*, that the question was properly ruled out, as it substituted the witness in the place of the court and jury, and made him the judge of the weight and effect of evidence.—*State v. Klinger*, 224.
7. *Practice, criminal—Evidence—Medical experts, facts being disputed, can only testify on hypothetical facts—Witnesses not experts can not give an opinion from evidence in a cause.*—A medical expert, who has been present during a trial and heard all the evidence, there being no dispute about the facts, may be asked his opinion about the whole matter; but when the facts are disputed, this course of interrogation is inadmissible, and the question should be stated hypothetically. And witnesses not experts may give their opinion, accompanied by the facts existing within their knowledge and observation, but they can not be permitted to give an opinion upon the question whether a hypothetical state of facts would or would not, if true, be evidence of insanity, nor from mere evidence which they have heard other witnesses detail.—*Id.*
8. *Practice, civil—Evidence—Laws of sister States must be proved like other facts.*—In the trial of a cause, the laws of another State are to be given in evidence like any other facts; and when the record shows no evidence proving



## EVIDENCE—(Continued.)

- them, instructions based on them are properly refused.—*Babcock v. Babcock*, 243.
9. *Practice, civil — Evidence — Rebuttal — New matter can not be gone into.*—A party can not go into proof of new and independent matter in rebuttal, and courts are fully warranted in excluding evidence of this description.—*Id.*
  10. *Justice's court — Transcript — Records of, certified in Circuit Court, proof of issue of execution.*—The records certified from the office of the clerk of a Circuit Court are competent proof of the issue and return of the justice's execution. (*Franse v. Owens*, 25 Mo. 329, affirmed.)—*Burke v. Miller*, 258.
  11. *Revenue — Tax deeds prima facie evidence of title.*—A tax deed is *prima facie* evidence of facts necessary to constitute title, and the *onus* is thrown upon him who would attack its validity.—*Abbott v. Lindenbower*, 291.
  12. *Evidence — Bank-books.*—A synoptical exhibit of the contents of bank-books is not the best evidence. The books themselves must be produced or their absence accounted for.—*Ritchie v. Kinney*, 298.
  13. *Evidence — Admissions of deceased persons, competency and effect of.*—Evidence of declarations in the nature of admissions by a deceased person, although competent, never amounts to direct proof of the facts claimed to have been admitted by those declarations; and it has sometimes been doubted whether they ought to be received at all when introduced for the purpose of divesting a title created by a deed. However, if properly sustained by other circumstances—as by evidence that the claimant's money was placed in the hands of the deceased for investment; that the property acquired was treated by the parties interested as their property, or by any other facts pointing to them as the equitable owners—such declarations would warrant courts in sustaining the claim.—*Johnson v. Quarles*, 423.
  14. *Evidence — Witnesses, where party is dead — Competency under the statute.*—In suit against the heirs of a deceased person for certain land, on the claim that said estate had been purchased by deceased with the money of plaintiff, and without his consent; the testimony of claimant as to money advanced deceased, and other facts touching the purchase, would be incompetent under the statute pertaining to witnesses. (*Wagn. Stat. 1872, § 1.*)—*Id.*
  15. *Corporations — Railroad companies — Negligence, what prima facie case of.*—The fact that the fire which caused the damage sued for was set by a railroad engine would be *prima facie* evidence of negligence by those who ran it, or who provided the engine with its contrivances, and would throw the burden of exonerating them upon the company.—*Bedford v. Hann. and St. Jo. R.R. Co.*, 456.
  16. *Criminal law — Indictment — Larceny — Evidence — Confession, when not voluntary and inadmissible.*—Under an indictment for larceny it appeared that defendant A. was a young man; that the prosecutor, B., a strong and vigorous man, who had been his former master, charged him with stealing his property, which charge A. denied; whereupon B. said he knew better; that he knew all about it, and that A. had better own up. A. then inquired whether, if he did confess, he would be let alone and not prosecuted. B. replied that he would make no promises; that he would not say whether he would let him go or not; but that he might as well own up, and that it would be better for him. A. then said he would tell all about it. No other persons were present. B. then reduced the confession to writing, and the next morn-



## EVIDENCE—(Continued.)

ing, A. denying its truth and demanding the delivery of the paper, he was arrested and indicted. *Held*, that, considering the relative situation of the parties, such a charge and assertion of knowledge of B.'s guilt were manifestly calculated to produce fear and intimidation; and that, although no positive promise was made, an allurements was held out which excited hope. And *held*, that a confession under such circumstances was not a voluntary one, such as, of itself, to warrant a conviction; not only so, but it was inadmissible, and should not have been given in evidence.

When a confession is forced from the mind by the torture of fear or the flattery of hope, it comes in such a questionable shape that it should be wholly rejected.—*State v. Brockman*, 566.

17. *Practice, civil — Evidence — Account — Items.*—Evidence is admissible touching different articles of merchandise sold, notwithstanding that they were embraced under one item, where the price paid was upon the mass, and not upon the individual articles.—*Nedvidek v. Meyer*, 600.
18. *Evidence — Sale, bill of — Consideration, additional may be shown by parol.*—Where a bill of sale stated a consideration, but not the whole consideration which induced the sale, it was competent by oral evidence to supply the omission and show the additional consideration, if not inconsistent with that expressed in the original document.—*Id.*

See AGENCY, 2, 4. BANKS AND BANKING, 3. BILLS AND NOTES, 3. CORPORATIONS, 3. DAMAGES, 1. EQUITY, 9. ESTOPPEL, 1. PRACTICE, CIVIL—PLEADINGS, 15. PRACTICE, CRIMINAL, 4, 18, 16. PRACTICE, SUPREME COURT, 8. REPLEVIN, 1. REVENUE, 3. ST. LOUIS, CITY OF, 5. SLANDER, 1, 3, 8. WILLS, 2, 3.

## EXCAVATIONS.

1. *Damages—Servitudes—Excavations—Pressure of buildings, etc.*—In a suit for damages caused by the bursting of a sewer and certain privies in plaintiff's premises, and the sliding in of an embankment about them into a cellar recently excavated by defendant, *held*, that plaintiff had a right to a support from the adjoining soil for his land in its natural state, but, in order to recover in such action, it should appear that the slide was not caused by the pressure of his buildings or by his sewer, and that the slide caused the bursting of the sewer.—*Busby v. Holthaus*, 161.

## EXECUTIONS.

1. *Executions levied second term after judgment.*—The act of March 23, 1863 (Sess. Acts 1863, p. 20), going into operation after the issue but before the expiration of an execution, extended it and the lien of the levy on real estate created by it till the next term of court at which the land could be sold, even though it were later than the second term after the date of judgment. The use of the future tense in the words "shall not be sold at the next term," etc., refers to the date of the execution and not that of the act, and its provisions are not confined to cases where the failure to sell arose after the passage of the act. No *renditioni exponas* or new execution was necessary unless the old one had been returned.—*Wood v. Messerly*, 255.
2. *Justice's court — Transcript — Lien in Circuit Courts — Execution.*—Under sections 16 and 17, p. 961, R. O. 1855 (Wagn. Stat. 839, §§ 13, 14), the plaintiff may cause a transcript of his judgment before a justice to be filed with the circuit clerk at any time after the rendition of the judgment, without

**EXECUTIONS—(Continued.)**

waiting for a return of *nulla bona* by the constable, and by so doing will create a lien on the real estate of defendant in the judgment from the time of filing. But the enforcement of the lien will be stayed until the return of *nulla bona* by the constable.—*Burke v. Miller*, 258.

See CONVEYANCES, 4, 13. GARNISHMENT, 1. SALES, 1, 2.

**EXEMPTION.**

See ATTACHMENT, 1.

**EXPERTS.**

See EVIDENCE, 6, 7.

**F****FORCIBLE ENTRY AND DETAINER.**

See LANDLORD AND TENANT.

**FRAUD.**

See CORPORATIONS, 3. EQUITY, 10. FRAUDULENT CONVEYANCES.

**FRAUDS, STATUTE OF.**

1. *Statute of frauds—Promise to indemnify one not a creditor—Effect of, under the statute, when not in writing.*—A. & B. composed a firm. B. gave his individual note for a certain sum, and C., being induced by the assurances of the firm that the money to be raised on the note was for their benefit, and that they would pay it, signed the same as surety. B. turning out insolvent, C. was compelled to pay the note, and brought suit against A., the remaining partner, for the amount. *Held*:

1. That the engagement of the firm was, in effect, a promise to indemnify C.

2. That being a promise to indemnify, it was not void under the statute of frauds, as made to C., who was not a creditor.

3. That the firm being liable for the note to B., the engagement of the firm was a promise to indemnify C. for an obligation which was their own, and hence was not void under the statute as not being in writing.—*Garner v. Hudgins*, 399.

2. *Frauds, statute of—Undertaking to pay debt of another being also to pay one's own debt, not in statute.*—Where a person, being indebted to the defendant in a judgment, undertook, by mutual agreement with the defendant and plaintiff therein, to pay the amount of the judgment to the latter, and by that act canceled so much of his own liability to the defendant, the promise was binding on him, although not in writing. When one undertakes to pay the debt of another, and by the same act also pays his own debt, which was the motive of the promise, the undertaking is not within the statute of frauds (Wagn. Stat. 656, § 5), and need not be in writing.—*Besshears v. Rowe*, 501.

**FRAUDULENT CONVEYANCES.**

1. *Fraudulent conveyances—Conspiracy—Fraudulent intent—Facts showing, should go to the jury.*—A. being in embarrassed circumstances, agreed with B. to make time purchases to the extent of his credit, and turn over the property to B. under pretense of sale, but the consideration being in fact merely colorable and fictitious. B. was then to negotiate a compromise with A.'s creditors and afterward divide the profits with A. In replevin by the vendors for a portion of the goods so turned over by A., it appearing that

## FRAUDULENT CONVEYANCES—(Continued.)

- they were bought after the formation of the conspiracy, *held*, that such facts were evidence which ought to go to the jury, tending to show the existence of a fraudulent intent on the part of A. at the time the purchase was made. Nor did the fact that a secret purpose was entertained of forcing an ultimate compromise, by which some part of the purchase money might in the end be paid, at all mitigate the character of the fraud.—*Fox v. Webster*, 181.
2. *Practice, civil—Pleadings—A general allegation of fraud is sufficient.*—It is sufficient if a petition allege fraud generally, without going into its history and details.—*Id.*
3. *Sales—Intention to defraud vitiates a sale.*—The preconceived design on the part of the vendee of not making good to the vendors the purchase money entering into the transaction, vitiates the purchase and gives the vendor a right of rescission.—*Id.*  
See *EQUITY*, 10.

## G

## GAMBLING.

See *CRIMES AND PUNISHMENTS*, 1.

## GARNISHMENT.

1. *Garnishment, judgment in—Judgment creditors—Motion to set aside judgment in garnishment by.*—After return day of an execution, plaintiff garnished a debtor of defendant. The garnishee appeared and answered the interrogatories, and judgment was obtained against him. *Held*, that the judgment was irregular, and should not have been entered; that the garnishee stood as though he had voluntarily appeared and answered interrogatories without notice, and that judgment creditors of defendant in execution, when he was shown to be insolvent and the judgment in the garnishment stood in the way of the collection of their claims, had such an interest in the suit against the garnishee as would authorize them to intervene by a motion to set aside the judgment on the garnishment.—*Southern Bank of Missouri v. McDonald*, 31.

## GUARANTY.

1. *Guaranty—Whether to be held continuing or otherwise—Construction, how determined.*—When it is doubtful, from the language contained in it, whether a guaranty was for a single dealing or a continuous one, the true principle of sound ethics is not to set up a presumption for or against the guarantor, but to give contract the sense in which the person making the promise believed the other party to have accepted it, if he in fact did so accept it.—*Boehne v. Murphy*, 67.

See also *WARRANTY*.

## GUARDIAN AND WARD.

See *LIMITATIONS*, 2.

## H

## HORSE-RACING.

See CRIMES AND PUNISHMENTS, 1.

## HUSBAND AND WIFE.

1. *Husband and wife—Purchase of necessities, husband liable for on the ground of agency.*—Where the wife purchases necessities on credit, the law holds the husband liable on the ground of presumed or implied agency. But such contracts are held to be his, not hers.—*Tuttle v. Hoag*, 38.
2. *Married woman—Action against husband for goods sold wife—Husband not chargeable, when.*—In an action for goods sold and delivered to a married woman—it appearing in evidence that she was carrying on business in her own name; that plaintiff trusted her solely, and that the husband had no connection with the business, and in the absence of proof that he ever in any manner gave his consent to her management of the business—*held*, that the husband would not be chargeable for the debt.—*Id.*
3. *Husband and wife—Separate property of wife—Husband need not be joined in suits concerning—Otherwise where property is simply that of wife.*—Where property is simply that of the wife, and not her separate property, whether conveyed to a trustee for her use or to her directly, the husband would have a marital interest, of which he could not be divested without his consent; and in suits pertaining to such property, he should be joined as a party. But her separate estate, on every rule governing it, must be considered as held by her, divested of any interest in the husband, and he need not be made a party to actions affecting it.—*Boal, Adm'r of Dugan, v. Morgner*, 48.
4. *Husband and wife—What words necessary to create an estate in the wife.*—No special or technical words are required to create in the wife a separate estate; but any provision that negatives or excludes the marital rights of the husband, while giving the property to the use of the wife, should be held to create in her a separate estate. Though the words "separate use" or "sole use" are usually employed, yet if the same intention is clearly expressed by other terms or promises of the instrument, such words are not necessary.—*Id.*
5. *Equity—Husband and wife—Contracts between, when valid.*—A contract between husband and wife will be held good in equity, as a general rule, when it would be valid and binding at law if made with trustees of the wife for her benefit. And in equity, the intervention of trustees is not an indispensable prerequisite to the validity of the contract.—*Tennison v. Tennison*, 77.
6. *Husband and wife—Equity—Property acquired by husband to be used for benefit of wife—Husband will be treated as trustee.*—Where a husband received funds, not for the purpose of appropriating them to his own use, but expressly and by positive agreement for the benefit of his wife, and to be appropriated to her sole and separate use, and afterward made the contemplated purchase in his own name, equity will treat him as holding the title as trustee for his wife.—*Id.*
7. *Mary T. Dugan's Administrator v. Albin Morgner, ante*, p 48, affirmed.—*Gatzweiler, Trustee of Mittalberger, v. Morgner*, 94.
8. *Married women—Separate estate of, subjected to payment of their separate debts.*—A *femme sole* may acquire by purchase as well as by gift a separate

## HUSBAND AND WIFE—(Continued.)

estate, and that, too, through a deed directly to herself, without the intervention of trustees; and such separate estate will be protected in equity against the marital rights of an after-taken husband who shall acquiesce in the arrangement and allow his wife to manage and control the property as her own, notwithstanding such marriage. Equity will also subject such estate to the payment of her debts and obligations. Where she joins in the execution of a note, it will be inferred, *prima facie*, that she intended thereby to charge her separate estate. Equity will protect the separate interests of a married woman against the claims of her husband and his creditors, but will subject such property to the payment of her own debts.—Schafroth, Adm'r, v. Amba, 114.

9. *Married women—Separate estate of, charged by direct proceedings in chancery.*—Where a married woman joins her husband in the execution of a note, the first and only method of charging her separate estate for the debt is a resort to chancery. The jurisdiction of chancery in such a case is in no way dependent upon antecedent legal proceedings against her husband, or those of any kind whatever.—*Id.*
10. *Married women may subject their ordinary estate to mechanics' lien.*—Under section 21 of the mechanics' lien act (Wagn. Stat. 911, § 21) a married woman may so far bind her ordinary estate by contract as to subject it to a mechanic's lien.—Tucker v. Gest, 339.
11. *Married woman—Conveyance to wife, not for separate use—Deed of trust given for—Bill in equity to subject property to debt.*—A married woman has no power to bind herself by a promissory note, except as to her sole and separate property. Yet, when she purchases real estate—even though the purchase deed does not create an estate for her sole and separate use, but an ordinary one, in which her husband had a marital interest—and gives her notes for the purchase money, secured by mortgage upon the property purchased, the vendee can hold it in equity for such purchase money. And the lien created by the deed of trust can be enforced by an action analogous to a late proceeding in chancery to subject the property to the payment of the debt, although no personal judgment can be given upon the notes.—Pemberton v. Johnson, 342.
12. *Contracts, executory, of married women, not absolutely void.*—The executory contracts of a married woman are not absolutely void. They are valid in equity when made on the credit or for the benefit of her separate estate.—Bruner v. Wheaton, 363.
13. *Husband and wife—Separate property of wife—Particular mode of disposition will not preclude her from adopting another mode, when.*—A *femme covert* is absolutely a *femme sole* with respect to her separate estate when she is not specially restrained, by the instrument under which she acts, to some particular mode of disposition. The *jus disponendi* is incident to her separate estate, and follows it by implication. And although a particular mode of disposition is pointed out, it will not preclude her from adopting any other mode of disposition unless there are words restricting her power of disposition to the only mode pointed out.—Kimm v. Weippert, 532.
14. *Note by married woman to create a charge on her separate estate, must show an intent to charge it, and the intent must be gathered from the contract itself.*—A note signed by a married woman, jointly with her husband, does



## HUSBAND AND WIFE—(Continued.)

not create a charge upon her separate estate unless a true interpretation of the contract shows an intent to render it liable. And her intent must be gathered from the contract itself, and not from extraneous parol evidence.

Thus, on the sale of certain land, a note for the purchase money, signed by the wife jointly with her husband, and secured by deed of trust, would not, on that state of facts, create a charge on the separate estate of the wife so as to render it liable for the residue of the debt in case the note was unpaid, and the land being sold under the deed of trust failed to satisfy it; and for the reason that a true interpretation of the note and deed taken together showed that the only security intended to be pledged was the property purchased.—*Id.*

15. *Equity—Husband and Wife—Voluntary assignment by an insolvent, of demands due himself, to his wife.*—Where a husband causes certain promissory notes, the consideration of which moved from himself alone, to be made payable to the order of his wife, the act will be regarded as a voluntary assignment or transfer of the claim to her without consideration; and if the husband is then insolvent, and such conveyance was made with intent to hinder, delay, and defraud creditors, it would be, for that reason, utterly void as to them.—*Reppy v. Reppy*, 571.

16. *Married women—Separate estate can not be acquired by husband permitting wife to collect rents, issues, etc.*—When the deed does not by its terms vest a separate estate in a married woman, the marital rights of her husband in the estate conveyed can not be alienated or defeated, *dehors* the deed, merely by his permitting her to hold and enjoy the property and collect and apply the rents, issues, and profits to her own use; nor can the wife in that way acquire a separate property in such estate.—*Schafroth v. Amba*, 580.

See CONVEYANCES, 2. DOWER.

## I

## INDICTMENT.

See PRACTICE, CRIMINAL, 8, 9, 14.

## INDORSEMENT.

See BILLS AND NOTES.

## INFANTS.

1. *Contracts—Purchase by minor child must be shown to be made by child as agent of father—Subsequent ratification of itself not sufficient.*—A father can not be held liable for a purchase made by his minor son, on the sole ground of a supposed subsequent ratification of the purchase and a promise to pay the purchase money. The father can be held only on the ground that he authorized the purchase, either expressly or by implication. Whether or not there was such authority is a matter for the jury, and not for the court. The fact of the subsequent ratification and promise is legitimate and persuasive evidence, from which the jury may find that the purchase was made by the son as the father's agent, acting under authority either express or implied. But the moral obligation of the father to support his child does not make him legally liable to pay his child's debts. And to charge a father on his son's contracts, the same circumstances must be shown as to charge an uncle, a brother, or any third person.—*Holt v. Baldwin*, 265.

## INJUNCTION.

See MORTGAGES AND DEEDS OF TRUST, 1. REVENUE, 6.

## INNKEEPERS.

See LIENS, INNKEEPERS'.

## INSANITY.

1. *Practice, criminal — Sanity — Evidence — Testimony of experts, when improper.*—In a murder trial, counsel for defendant put to a medical expert the following question: "When the defendant has been undeniably subject to fits of epilepsy, should he not have the benefit of every reasonable doubt that might arise as to his sanity?" *Held*, that the question was properly ruled out, as it substituted the witness in the place of the court and jury, and made him the judge of the weight and effect of evidence.—*State v. Klinger*, 224.
2. *Practice, criminal — Evidence — Medical experts, facts being disputed, can only testify on hypothetical facts — Witnesses not experts can not give an opinion from evidence in a cause.*—A medical expert, who has been present during a trial and heard all the evidence, there being no dispute about the facts, may be asked his opinion about the whole matter; but when the facts are disputed, this course of interrogation is inadmissible, and the question should be stated hypothetically. And witnesses not experts may give their opinion, accompanied by the facts existing within their knowledge and observation, but they can not be permitted to give an opinion upon the question whether a hypothetical state of facts would or would not, if true, be evidence of insanity, nor from mere evidence which they have heard other witnesses detail.—*Id.*
3. *Statute, construction of — Insanity — Restraint after acquittal, on ground of.*—The statute restraining prisoners who are acquitted on the ground of insanity, has reference solely to insanity existing at the time of the trial, and then it is a question exclusively for the determination of the court, with which neither the jury nor counsel have anything to do.—*Id.*
4. *Criminal law — Insanity to be determined like any other fact.*—In the trial of a criminal case the burden of establishing the insanity of the accused to the satisfaction of the jury rests upon the defense; but it is unnecessary that his insanity should be established beyond a reasonable doubt. All symptoms and tests of mental disease are purely matters of fact for the jury, and to be determined like other facts; and it is sufficient if the jury are reasonably satisfied from the weight or preponderance of evidence that the accused was insane at the time of the commission of the act. (*State v. Klinger, ante*, p. 224.) And an instruction which requires a *clear* preponderance of evidence to establish sanity introduces a qualification not warranted by law, and calculated to mislead.—*State v. Hundley*, 414.
5. *Criminal law — Temporary insanity caused by intoxication, responsibility for.*—Temporary insanity, produced immediately by intoxication, does not destroy responsibility for crime, where the patient, when sane and responsible, made himself voluntarily drunk; but, to be punishable, the crime must be the immediate result of the fit of intoxication, and while it lasts, and not the result of insanity remotely occasioned by previous bad habits. In the latter case insanity is entitled to the same consideration as when arising from any other cause.—*Id.*

## INSTRUCTIONS.

See PRACTICE, CIVIL — APPEALS, 8—TRIALS, 5.

## INSURANCE, FIRE AND MARINE.

1. *Insurance, marine — Perils proximately causing loss, if insured against, need not be extraordinary.*—If a boat insured was seaworthy when leaving port, it does not affect the liability of her insurers whether or not the peril from which she suffered was an ordinary one or one which the boat, under good management, could safely have encountered—provided it was insured against and was the proximate cause of the loss—or whether it was extraordinary, and one which she was not built to encounter.—*Lockwood v. Sangamo Ins. Co.*, 71.
2. *Insurance, marine — Total loss — Damage of over fifty per cent. at time of repair, constructive total loss.*—A damage of over fifty per cent. of the value of an insured vessel when repaired is a constructive total loss of the vessel, in case of the policy containing no express provision to the contrary, and not one-half of its value in the policy.—*Id.*
3. *Insurance, marine — Abandonment, jury should be told what acts constitute.*—In an action on a policy of marine insurance, the jury should be told what acts are necessary to constitute an abandonment, or whether certain acts claimed to have been proved would constitute such abandonment.—*Id.*
4. *Insurance, marine — Agreement of parties best evidence of value of interest insured, when.*—In case of a total loss of an insured vessel, the agreement of the parties—no fraud being shown—and not the varying opinion of witnesses, is the best evidence of the value of the interest insured, and they must be governed by it.—*Id.*
5. *Insurance, marine — Agreement — False representation.*—The insurance of a barge was to commence, by the terms of the policy, "wherever she was in safety on the 26th day of March, 1868, \* \* \* with permission to navigate the Mississippi from the city of St. Louis to Helena," etc. The policies were issued while the barge was lying opposite Alton and ready to be loaded. It was loaded at once, and, while being prepared for its trip, took fire and was burned. In an action on the policy for the loss of the boat, *held*, that the permission to navigate the river below St. Louis was rather a limitation upon plaintiff than a provision for the commencement of the risk, and was somewhat in the nature of an exception in favor of the insurance company, and should be construed most strongly against it. It should not be so applied as to contradict the express agreement as to the time of the commencement of the risk. *Held*, further, that if it appeared in evidence that plaintiff, when he obtained the policy, falsely represented the barge as already loaded and coming down the river, such representation would avoid the policy.—*Schroeder v. Stock and Mutual Ins. Co.*, 174.
6. *Insurance — Total loss — Abandonment, what facts authorize.*—When a vessel insured is stranded, the question whether the loss shall be deemed partial, or so far total as to warrant an abandonment, will depend upon the nature and extent of the peril in which the vessel is involved and the probable difficulty, hazard, and expense of attempting to deliver and repair her. When it appears that by proper exertions she might have been gotten off, and fully repaired at a moderate cost, the abandonment is void, and a partial loss only can be recovered; and to warrant the recovery of a total loss it must be

## INSURANCE, FIRE AND MARINE—(Continued.)

proved that the delivery of the vessel from peril was, upon reasonable grounds, judged to be impracticable, or not to be effected unless at an expense that would absorb her value. The question is one of fact, and must be determined by the jury from the evidence before them.—*Copelin v. Phoenix Ins. Co.*, 211.

7. *Insurance — Abandonment — Repairs — Reasonable time.* — After a vessel is abandoned by her owner and taken in custody by the insurer, unless her repairs are made within a reasonable time the insurer forfeits his right to return her, and must be considered as having accepted the abandonment.—*Id.*

See CORPORATIONS.

## INTEREST.

See REVENUE, 4.

## J

## JUDGMENTS.

1. *Judgments of sister States conclusive evidence of what.*—Judgments rendered in other States are not treated as foreign; and though they are not so far domestic that they can be enforced without a new judgment, they are conclusive of everything except jurisdiction over the parties or the subject-matter; and where the service on defendant was good according to the laws of the State where the judgment was obtained, the court of that State would obtain jurisdiction of defendant's person, and the judgment would be at least *prima facie* evidence of the indebtedness sued on.—*Barney v. White*, 187.
2. *Judgment — Satisfaction, acknowledgment of, when authorized — May be set aside, how.*—A judgment can not be set aside after the term at which it is rendered, but an entry of satisfaction, made subsequent to the term, may be. The acknowledgment of satisfaction is merely evidence of payment, and, if made *bona fide* and correctly, forever discharges and releases the judgment or decree. But as between the parties, if made unauthorizedly or by mistake, it may be canceled or set aside on motion.—*Cohen v. Camp*, 179.
3. *Res adjudicata — Judgment affirmed in Supreme Court for failure to assign errors.*—Where a motion to set aside a sale of land is appealed to the Supreme Court, and for want of assignment of errors the action of the lower court is affirmed, parties are concluded by its disposition; and in event of subsequent proceedings instituted for the same purpose, equity has no power to relieve them.—*Miller v. Bernecker*, 144.
4. *Practice, civil — Proceedings under statute to reinstate judgment — Specific issues may be submitted to the jury.*—A proceeding under the statute (Wagn. Stat. 1137, §§ 14, 15) for the reinstatement of a judgment, whereof the record has been lost or destroyed, is not by motion, but upon petition and answer, as in ordinary cases at law; and the case need not be submitted to the court alone without the aid of a jury, nor need the opinion of the jury be taken upon the whole case, but the court is authorized by the statute (Wagn. Stat. 1041, § 13) to take their findings as to any specific questions of fact upon issues framed for that purpose, without being required to submit to them all the issues arising on the pleadings. The authority to do so is not limited to chancery proceedings.—*Besshears v. Rowe*, 501.

## JUDGMENTS—(Continued.)

5. *Practice, civil—Judgments rendered against persons formerly in military service within year after discharge, irregularity of—Statute, construction of.*—A judgment can not be set aside on the ground of irregularity under the acts of May 15, 1861, and March 13, 1863 (Sess. Acts 1861, p. 46, and Sess. Acts 1863, p. 30), simply because rendered against defendant within a year after his discharge from the military service of the United States. These acts do not prohibit the institution or prosecution of suits against persons in the military service, but they merely secure to such persons, when sued, the right to delay the trial and put off the final judgment until twelve months after their discharge. And the party, in order to avail himself of the right, must claim it at the proper time and place; otherwise he will be held to have waived it.—Reed v. Wangler, 508.

See CONTRACTS, 12. CORPORATIONS, 3. GARNISHMENT, 1. PARTITION, 2.

## JURISDICTION.

See COURTS, COUNTY, 1, 2. JUSTICES' COURTS, 6.

## JURY.

See PRACTICE, CRIMINAL, 1, 2, 6.

## JUSTICES' COURTS.

1. *Justices' courts—Complaint—Averments of, not controlled by title.*—The averments of a complaint before a justice, under section 19, p. 844, Wagner's Statutes, are not controlled by the title thereto, which may be treated as surplusage.—State, to use of Kearney, v. Dehlinger, 106.
2. *Practice, civil—Appeal from justice's court—Cause of action—Statement of, can not be amended, when.*—Section 19, chapter 185, page 850, Wagn. Stat., providing that the same cause of action which was tried before a justice shall be tried on appeal to the Circuit Court, does not forbid a change in the statement of the cause of action itself, or an amendment of a loose and uncertain statement, provided the cause of action is not changed. But in a suit not founded on an account or instrument of writing, a paper filed with the justice in the following words, to-wit: "A., debtor to B., to \$50," wholly fails to be a "statement of facts constituting a cause of action" as required by that section; it can not be amended in the Circuit Court, and the case should be dismissed on motion.—Brashears v. Strock, 221.
3. *Justice's court—Transcript—Lien in Circuit Courts—Execution.*—Under sections 16 and 17, p. 961, R. C. 1855 (Wagn. Stat. 839, §§ 13, 14), the plaintiff may cause a transcript of his judgment before a justice to be filed with the circuit clerk at any time after the rendition of the judgment, without waiting for a return of *nulla bona* by the constable, and by so doing will create a lien on the real estate of defendant in the judgment from the time of filing. But the enforcement of the lien will be stayed until the return of *nulla bona* by the constable.—Burke v. Miller, 258.
4. *Justice's court—Transcript—Records of, certified in Circuit Court, proof of issue of execution.*—The records certified from the office of the clerk of a Circuit Court are competent proof of the issue and return of the justice's execution. (Franse v. Owens, 25 Mo. 329, affirmed.)—*Id.*
5. *Justice's court—Replevin—Statement—Venue.*—In suit for replevin before a justice, the statement that plaintiff was the owner and entitled to the possession of the property is sufficient, without an averment that plaintiff was



## JUSTICES' COURTS—(Continued.)

*lawfully* entitled to it, and the venue is sufficiently laid if it appear in the margin.—Stoker, Adm'r, v. Crane, 264.

6. *Justices' courts—Attachment—Garnishment—Jurisdiction of justices' courts not presumed.*—The return of a constable, on order of publication issued in an attachment proceeding before a justice of the peace, showing that the same was executed by "posting in four public places," etc., but not that it was posted twenty days before the day when defendant was obliged to appear (Wagn. Stat. 196, § 77), gave the justice no jurisdiction over the defendant. Judgment based on such a notice would be simply void, and would not sustain a judgment against a garnishee.

The jurisdiction of inferior courts will not be presumed, and must be proved.—McCloon v. Beattie, 391.

See PRACTICE, CIVIL—APPEAL, 11.

## JUSTICE OF THE PEACE.

See CONVEYANCES, 2, 10. JUSTICES' COURTS.

## L

## LANDS AND LAND TITLES.

1. *Land and land titles—Tax sales—Land assessed in wrong name, sale invalid.*—In ejectment for land bought at a tax sale, where it appeared that the assessment was made and judgment rendered in the name of one not the owner, *held*, that the advertisement was no notice to defendant; that there was no valid judgment, and that plaintiff acquired no title by the sale. (Abbott v. Lindenbower, 43 Mo. 162, affirmed.)—Hume v. Wainscott, 145.
2. *Conveyances—Recorded deed by heirs will give title as against unrecorded deed of deceased grantor.*—The heirs of a grantor in an unrecorded deed of land, on his death become the apparent owners of the legal title, and a duly recorded conveyance by them of the same estate to an innocent purchaser will carry the title as against the first grantee, in like manner as if made by the ancestor.—Youngblood, Adm'r of Tuley, v. Vastine, Adm'r of Wright, 239.
3. *Revenue—Tax sales—Abbott v. Lindenbower, 42 Mo. 162, did not attempt to anticipate all objections to.*—The true spirit and meaning of the decision in Abbott v. Lindenbower, 42 Mo. 162, was simply that certain things were essential to the valid exercise of the taxing power, and could not be dispensed with by the Legislature; and that, in defending against the effect of a tax deed, the want or omission of them might be shown in evidence, notwithstanding the statute (Gen. Stat. 1865, p. 127, §§ 111-12); but that decision did not attempt to specify all the things that were so essential—to anticipate all possible objections to every tax sale.—Abbott v. Lindenbower, 291.
4. *Lands and land titles—Tenant in common, title under.*—The conveyance of "one-fourth" of a tract of land, without designating by metes and bounds, or otherwise locating the part conveyed, vests in the grantee and those claiming under him the title to one undivided fourth of the whole tract, as tenant in common with the grantor; and the grantee can not obtain partition of the tract and locate his interest without legal process or consulting his co-tenant. This could only be done where the deed was open to construction as to what

## LANDS AND LAND TITLES—(Continued.)

particular portion of the tract was meant to be conveyed, or where it might be held to inure in different ways. But the case supposed would be no subject for construction or the application of the doctrine of inurement.—*McCaul v. Kilpatrick*, 434.

5. *Lands and land titles—Actions for recovery of lands, limitations to—Act in force at time action is commenced, and not when cause of action accrued, must govern.*—An action for real estate brought more than ten years from the passage of the act of 1847, and more than three years after the disability of the defendant had been removed (Sess. Acts 1847, p. 94, §§ 1, 4), was barred, even though the cause of action accrued under the limitation act of 1825, which permitted plaintiff to sue at a date subsequent in point of time to that limited by the act of 1847. And the case would not be taken out of the provisions of the act of 1847 by section 15 of the limitation act of 1855 (R. C. 1855, p. 1053, § 15). Under a proper interpretation of that section, plaintiff's action was subject to the laws in force at the time of the passage of the act of 1855, viz: the laws of 1847. The "laws" referred to in section 15 were not those in force when the right of action accrued, but when the act of 1855 took effect. And section 14 of the limitation act of 1865 (Gen. Stat. 1865, p. 747) does not enlarge the scope of section 4 of the act of 1847. Section 14 is a continuation of section 10, article II, chapter 103, R. C. 1855, and has no reference to suits for the recovery of real property.—*Billion v. Walsh*, 492.

6. *Ejectment—Sub-letting—Rescission—Rents and profits, testimony as to.*—Under an agreement between A. and B. for the sale of certain premises then in litigation, the deed was not to be required till the title was quieted, but B. was to have immediate possession, with full power to act in all things as if he had the absolute conveyance, taking to his own use the rents, issues, and profits. B. went into possession and sub-let to C. In ejectment by A. against C., held, that an application of A. for rescission of the contract by mutual consent was not a rescission, nor did it imply any breach or abandonment of the contract on the part of B.; and that, while his rights in the premises continued under the agreement, rents were properly paid to him by C., and could not be again recovered from C., and that testimony showing payment of money for rents and repairs by C. during that time was proper.—*Picot v. Douglass*, 497.

7. *Lands and land titles—Merger—Legal and equitable estate.*—The rule of law is inflexible, that where a greater and less estate meet and coincide in the same person, in one and the same right, without any intermediate estate, the less estate is immediately annihilated or merged; and the rule applies to the union of the legal with the equitable interest. Yet this rule is not inflexible with courts of equity, but will depend on the intention and interest of the person in whom the estates unite.—*Atkinson v. Angert*, 515.

See EVIDENCE, 13. LANDLORD AND TENANT, 4, 6.

## LANDLORD AND TENANT.

1. *Forcible entry and detainer—Possession sufficient to maintain an action for.*—The fact of previous peaceable possession by plaintiff is all that is necessary to enable him to maintain an action for forcible entry and detainer. Questions touching the right of possession can not be raised in this action.—*Prewitt v. Burnett*, 372.

## LANDLORD AND TENANT—(Continued.)

2. *Forcible entry and detainer—Possession, actual and constructive—Constructive, when sufficient.*—One in actual possession of a part of a tract of land, and holding the whole under claim and color of title, will in law be held to be in possession of the remainder, and actual occupancy thereof will not be necessary to entitle him to action for forcible entry and detainer; and for the purpose of that action the boundaries will be fixed as they are known and recognized, and not as they may be established by actual survey.—*Id.*
3. *Forcible entry and detainer—Entry and planting crops on lands of another—Forcible ouster—Remedy.*—Where A. had entered upon the land of B. and planted a crop, and was in peaceable possession of the same, no superior right of B. could justify him in ousting A. by force; and in case of such ouster, A. would be entitled to recover possession in an action for forcible entry and detainer.—*Harris v. Turner*, 438.
4. *Forcible entry and detainer—Occupancy of part of tract of land—How construed as to whole tract, in first instance—How in case of intrusion.*—The occupancy of a part of an inclosure by planting crops would naturally be construed as indicating an intention to hold possession of the whole field, and it would be sufficient for the purpose of an action of forcible entry and detainer to show such possession in the first instance; but where plaintiff was shown to be a mere intruder, the rule is different, and his possession should be held to be confined to the land actually in cultivation.—*Id.*
5. *Forcible entry and detainer—Term "cabin" in action of, construed to mean what.*—A suit for forcible entry and detainer is for the possession of real property; and where the record in such a proceeding showed that the suit was for the possession of "a certain cabin situated, standing, and being upon the southwest quarter-section," etc., *held*, that the action included not merely the cabin, but the ground inclosed by it.—*Harvie v. Turner*, 444.
6. *Forcible entry and detainer—Action of, does not affect title to premises.*—The adjudication in an action for forcible entry and detainer in no way affects the title to the premises or the right to their possession.—*Id.*
7. *Forcible entry and detainer—Res adjudicata.*—The issue embraced in a suit for the forcible entry and detainer of certain premises can not be re-tried after judgment, because the subsequent suit may embrace premises not included in the first. The consequences of the first judgment could not be escaped by a mere enlargement of the claim.—*Id.*
8. *Landlord and tenant—Principal and agent—Res adjudicata—Identity of parties in different suits.*—If an agent or tenant were sued, and the principal or landlord had notice of the pendency of the suit, and an opportunity to come in and cross-examine the witnesses and make defense to the action, and in a subsequent suit, involving the same subject-matter, the principal or landlord were made a party directly, yet the identity of the parties would be sufficient to establish a *res adjudicata* as to the litigants in the second suit.—*Id.*

See PRACTICE, CIVIL—ACTIONS, 6.

## LAW MERCHANT.

See BILLS AND NOTES, 2.

## LAWS OF SISTER STATES.

See EVIDENCE, 8.

**LIEN.**

See **EXECUTIONS. JUSTICES' COURTS, 4. MECHANICS' LIENS. SALES, 1, 2.**

**LIEN, INNKEEPERS'.**

1. *Lien — Innkeeper — Innkeeper can not sell without judicial process.*—An innkeeper has a lien on the baggage of his guests for the non-payment of their bills, but he has no power to enforce such lien by sale without judicial process.—Case v. Fogg, 44.

**LIMITATIONS.**

1. *Limitations, statute of — Absence of plaintiff from the State.*—Absence of plaintiff from, or his non-residence in, the State, does not prevent the running of the statute of limitations.—State, to use of Coleman, v. Willi, 236.
2. *Limitations — Guardian and ward — When statute commences running.*—After the ward becomes of age, he stands in the relation of creditor to his guardian. His cause of action is then complete; and if he fails to bring suit within the time limited by statute thereafter, the claim is barred.—*Id.*
3. *Limitation — Acts of, not expressly discharging debt, go to remedy merely.*—Acts of limitation, unless they expressly discharge a debt, go to the remedy merely, and none can be pleaded except those in force when the suit is brought.—Carson v. Hunter, 467.
4. *Limitations, statute of — Removal from one State to another — Revival of contract.*—A debt barred by the statute of one State, but not by that of another, may be revived by the removal of the debtor from the former to the latter, between the periods of limitation; and an act which provides that suit on a given class of contracts shall be brought within a certain period, "and not after," does not extinguish the contract after that period, so as to prevent such a revival.—*Id.*
5. *Lands and land titles — Actions for recovery of lands, limitations to — Act in force at time action is commenced, and not when cause of action accrued, must govern.*—An action for real estate brought more than ten years from the passage of the act of 1847, and more than three years after the disability of the defendant had been removed (Sess. Acts 1847, p. 94, §§ 1, 4), was barred, even though the cause of action accrued under the limitation act of 1825, which permitted plaintiff to sue at a date subsequent in point of time to that limited by the act of 1847. And the case would not be taken out of the provisions of the act of 1847 by section 15 of the limitation act of 1855 (R. C. 1855, p. 1053, § 15). Under a proper interpretation of that section, plaintiff's action was subject to the laws in force at the time of the passage of the act of 1855, viz: the laws of 1847. The "laws" referred to in section 15 were not those in force when the right of action accrued, but when the act of 1855 took effect. And section 14 of the limitation act of 1865 (Gen. Stat. 1865, p. 747) does not enlarge the scope of section 4 of the act of 1847. Section 14 is a continuation of section 10, article II, chapter 103, R. C. 1855, and has no reference to suits for the recovery of real property.—Billion v. Walsh, 492.

See **CONVEYANCES, 4**

**LUNATIC ASYLUM.**

1. *Mandamus — Auditor — State lunatic asylum — Board of managers, requisition by.*—The act of March 23, 1870, touching appropriations for the State lunatic asylum (Sess. Acts 1870, p. 10), does not impose upon the State audi-

**LUNATIC ASYLUM—(Continued.)**

tor the burden of examining and passing upon the legality of the several items of the bills incurred by the managers of that institution for purchases and improvements, etc., before paying amounts claimed. The law intrusts the expenditure of the fund to the good faith and official responsibility of the asylum managers. It is not for the auditor to go back of the requisition authorized by the act.—*State ex rel. Treasurer State Lunatic Asylum v. State Auditor*, 326.

**M****MALICE.**

See *SLANDER*, 4, 5.

**MANDAMUS.**

1. *Mandamus—Verdict—Costs—Surplusage—New trial.*—A verdict in these words, "We, the jury, find for the defendants, they to pay the costs of this suit," is a good and complete verdict. That part of it relating to the costs was merely void, and should have been regarded as surplusage. A circuit judge refusing to receive such a verdict may be compelled to do so by proceedings in *mandamus*. But plaintiffs in the suit will have leave to file their motion for a new trial in the same manner as if the verdict had been received and entered at the proper time.—*State ex rel. Webster v. Knight*, 88.
2. *Mandamus—Act of November 5, 1857, bonds issued under—Warrants, county—Mandamus to enforce payment of by taxes.*—Certain warrants issued by the County Court of Clay county were in the following form:  
 "Treasurer of County of Clay:  
 "Pay to the Farmers' Bank of Missouri one hundred dollars, out of any money in the treasury appropriated for county expenses, with eight per cent. interest from 15th of April, 1861.

"Given at the court-house this 7th day of May, 1861.

"By order of the County Court.

"Test: E. D. MURRAY, Clerk.

THOMAS M. CHEVIS, President."

In *mandamus* by the holder of said warrants against Clay county, based on the act of November 5, 1857 (Adj. Sess. Acts 1857, p. 276), to compel its County Court to assess a tax for the purpose of raising money to pay them, *held*, that the warrants had none of the *indicia* of bonds authorized by the act—not being issued in the name of the county, or under the seal of the court, and not containing on their face a statement of the time, terms, and amount of the loan—and that the application for *mandamus* must fail.—*State ex rel. White v. Clay County*, 231.

3. *Mandamus does not lie to enforce collection of ordinary county indebtedness, prior to judgment obtained thereon.*—A relator is not entitled to peremptory *mandamus* to enforce the collection of an ordinary county indebtedness, prior to that indebtedness being reduced to judgment.—*Id.*

See *CORPORATIONS*, 1. *PRACTICE, CIVIL—PLEADING*, 13.

**MARRIED WOMEN.**

See *HUSBAND AND WIFE*.

**MECHANICS' LIENS.**

1. *Mechanics' lien—Failure of claimant to sign affidavit attached to lien—Signature not absolutely necessary under statute—Jurat may be amended.*—



**MECHANICS' LIENS—(Continued.)**

The signature of a claimant under the mechanics' lien law, appended to his statement, and the certificate of the clerk of the court that he made oath to the accompanying affidavit, is a substantial compliance with the statute (Wagn. Stat. 909, § 5), although the claimant fail to sign the affidavit. And objection being offered to the reading of the lien in evidence at the trial, on account of the absence of such signature, the clerk should be allowed to amend his jurat in this respect.—*Laswell v. Presbyterian Church*, 279.

2. *Mechanics' lien—Sub-contractor may file account blending labor and material, after expiration of thirty days.*—In a suit on a mechanics' lien, where the case showed that plaintiff was neither a day-laborer nor a journeyman, but that he did the work and furnished the material under a contract with the original contractor, *held*, that he might file his lien account after the expiration of thirty days, and at any time within four months after the debt accrued, although it blended items for labor done with those for material furnished. Only journeymen and day-laborers would be barred from filing such an account by the lapse of thirty days.—*Id.*
3. *Mechanics' lien—Notice need not specify in what specific manner demand accrued.*—Where a mechanics' lien account comprehended labor and material, the claimant will not be confined to his action for labor done because his notice to defendant claimed only for labor, and not for material. (Wagn. Stat. 911, § 19.)—*Id.*
4. *Mechanics' liens—Act not to be construed strictissimi juris, but so as to secure substantial justice.*—In suit on a mechanic's lien by the sub-contractor against the owner of the premises, plaintiff's notice of lien gave the name of his real debtor, but coupled with it that of a third party who was not liable. *Held*, that if defendant was not misled to his injury by the mistake, the error would not vitiate the lien, and that, in the absence of proof, no presumption would arise that defendant was so misled. The theory that the mechanics' lien act is in derogation of the common law, and should therefore be construed strictly as against those seeking to avail themselves of its benefits, is not supported by the better decisions, which hold that its provisions should be so interpreted as to secure the classes of persons named in the act, on their complying substantially and in good faith with its provisions.—*Putnam v. Ross*, 337.
5. *Married women may subject their ordinary estate to mechanics' lien.*—Under section 21 of the mechanics' lien act (Wagn. Stat. 911, § 21) a married woman may so far bind her ordinary estate by contract as to subject it to a mechanic's lien.—*Tucker v. Gest*, 339.
6. *Mechanics' lien law to be liberally construed so as to advance the remedy, etc.*—The mechanics' lien statute is to be construed in reference to the intention of the Legislature in enacting it, and liberally, so as to advance the remedy, and not merely in the strictness of the letter.—*Oster v. Rabeneau*, 595.
7. *Mechanics' lien not void because description embraced more than one acre, when.*—A mechanic's lien upon a lot of land in the city of St. Louis was not void because the description of the property filed in the clerk's office embraced more than one acre, no fraud being suggested, and the description being sufficiently full and accurate to enable the court to make it certain and exact. And *semble*, that the locality of the acre to be subjected to the lien may be fixed and surveyed by a commissioner sent out for that purpose.—*Id.*

**MILITARY SERVICE.**

See JUDGMENTS, 5.

**MISTAKE.**

See CONVEYANCES, 4. PARTITION, 3. PRACTICE, CIVIL—ACTIONS, 3.

**MONEY HAD AND RECEIVED.**

See PRACTICE, CIVIL—ACTIONS, 3.

**MORTGAGES AND DEEDS OF TRUST.**

1. *Mortgages — Encumbrances — Injunction.*—An encumbrancer has no right to enjoin the sale of the property under a prior encumbrance, unless he is ready and offers to pay off the prior encumbrance in full; more especially when the property is depreciating in value.—*Meysenburg, Trustee of Sternberg, v. Schlieper*, 209.
2. *Deed of trust notes — Sale — Purchaser.*—Deed of trust notes may be bought up, and the purchaser may sell out and buy in the property conveyed in trust for their security.—*Miltenerberger v. Morrison*, 251.
3. *Mortgages and deeds of trust — Mortgagor continues owner till when.*—The modern doctrine is well established that a mortgage is but the security for the payment of the debt or the discharge of the engagement for which it was originally given; and until the mortgagee enters for breach of the conditions, and in many respects until the final foreclosure of the mortgage, the mortgagor continues the owner of the estate, and has a right to lease, sell, and in every respect to deal with the mortgaged premises as the owner, so long as he is permitted to remain in possession.—*Woods v. Hilderbrand*, 284.
4. *Ejectment — Mortgage — Outstanding title.*—A defendant in ejectment can not set up a mortgage with which he is not connected as an outstanding title to the land in controversy, so as to defeat a recovery.—*Id.*
5. *Bills and notes maturing at different times — Deed of trust to secure, may be applied to notes last falling due.*—The holder of different notes secured by deed of trust may apply the entire proceeds of sale under the deed to the payment of those last maturing, and will not be prevented thereby, either in law or equity, from obtaining judgment against a surety on the note first falling due.—*Mathews v. Switzler*, 301.

See CONVEYANCES, 7. DOWER, 1, 2. HUSBAND AND WIFE, 11. SALES, 1, 2.

**NEGLIGENCE.**

See DAMAGES, 3, 6.

**NEW TRIALS.**

See PRACTICE, CIVIL—APPEALS, 2. PLEADINGS, 1, 15. TRIALS, 4.

**NON-SUIT.**

See PRACTICE, CIVIL—APPEAL, 6.

**NOTICE.**

See CONVEYANCES, 6, 9, 10.

**O**

**OFFICERS.**

See CLERKS OF COURTS. LUNATIC ASYLUM. PARTITION. PUBLIC PRINTER. REVENUE. ST. LOUIS, CITY OF. SHERIFF. SURETY, 2.

## OFF-SET.

See PRACTICE, CIVIL, 4. PRACTICE, CIVIL—ACTIONS, 1.

## ORDINANCES.

See ST. LOUIS, CITY OF.

## P

## PARTITION.

1. *Partition—Petition—Allegations, what sufficient.*—In a partition suit, allegations of seizin in the ancestor and descent to the heirs are, *prima facie*, sufficient to vest both title and possession in the latter.—*Tupperry v. Hertung*, 185.
2. *Partition—Under act of 1865, attorneys could not stipulate for judgment in what cases.*—Where the answer in a suit for partition stated, among other things, that administration had not been closed on the estate sought to be partitioned, and that there were not sufficient personal assets to pay the debts of the deceased, the attorneys of record, under the partition act of 1865 (Gen. Stat. 1865, ch. 152, § 51), had no power to stipulate that judgment of partition should be rendered, even though it was further agreed that the proceeds arising from the sale under the partition should be subject to the debts of the deceased.—*Id.*
3. *Partition, amicable—Utmost fairness should be exercised—Sale set aside, for what.*—In amicable proceedings in partition, the utmost fairness and good faith should be observed; and if, from accident, mistake, or any cause, the parties interested have been prevented from looking after their interests, and the property has been sacrificed, a sound exercise of judicial discretion would demand that the sale be set aside.—*Patton, Ex'r, v. Hanna*, 314.
4. *Partition—Return need not be made to a specified term.*—In sales in partition, the sheriff is not compelled, as in sales *in invitum*, to sell and make return at a specified term. "The same regulations prescribed" as for sales upon executions (§ 81, partition act) must refer rather to the advertisement and manner of sale than to the time when the sale shall be made and returned.—*Id.*
5. *Partition—Order for sale should direct at term of what court sale should be made.*—The failure of the court, in its order of sale in partition, to direct whether the sale should be had at a term of the Circuit or County Court (§ 63, partition act) would not vitiate the title under the sale, but the order should be amended to conform to the act.—*Id.*

See WILLS, 1.

## PARTNERSHIP.

1. *Practice, civil—Actions—What will lie at law between partners.*—An action at law will lie by a partner against his co-partner, without a settlement of partnership accounts, for money received by the latter as plaintiff's agent and credited to him in an account disconnected with the affairs of the firm.—*Seaman v. Johnson*, 111.
2. *Partnership—Retirement of member—New firm.*—Nothing is better settled than that the retirement of any one partner from a firm consisting of any number of partners operates a dissolution of that firm. Though the business may be continued by the successors even under the same name and style, it is a new firm. And the assignment by one partner of his rights to a co-partner

**PARTNERSHIP—(Continued.)**

is, *ipso facto*, a dissolution of that firm; and, further, where one party goes out of a firm, in order to make the debts of the old partnership a charge upon the new there must be the concurrent consent of three parties—the creditors, the old firm, and the new.—*Spaunhorst v. Link*, 197.

3. *Partnership—Purchase with joint capital, interest secured by.*—Parties combining their capital in building a boat thereby acquire a joint property in it, and no bill of sale or formal delivery is requisite to vest such interest as between the parties.—*Ritchie v. Kinney*, 298.
4. *Partnership—Settlement—Action between partners—Bill in equity, when unnecessary.*—If one partner collect a portion of the claims due the firm, and fail to account for the amount so collected in the partnership settlement, he may be sued by the other partner without any impeachment of the settlement or readjustment of the partnership accounts. Partners are not forbidden to sue each other at law, merely because they are or have been partners, but only when the adjustment of the matter in controversy involves the investigation and settlement of partnership accounts.—*Russell v. Grimes*, 410.
5. *Partnership—Suit by partner for balance due, can not be brought without settlement and balance struck.*—A partner can not sue his co-partner at law for any balance claimed to be due him, unless there has been a settlement and balance struck, and even then it has been generally held that there must have been an express promise to pay such balance. But when, after a settlement, it was discovered that a single item or number of items of cash, and nothing more, had been received by one partner and fraudulently withheld from the account—that the debts were all paid, and that payment of half the amount to his co-partner would settle everything—*semble*, that, under the code, a claim for the one-half might be sustained without an express promise and without formally opening the settlement.—*Id.*

**PRACTICE, CIVIL.**

1. *Sheriff—Return made in name of deputy insufficient—May be amended after judgment, when.*—A return of process signed "John Butler, deputy sheriff," is insufficient to give the Circuit Court jurisdiction of the person of defendant. But it may be amended in aid of judgment, on reversal of the cause, so as to make the return in the name of the principal sheriff; and it makes no difference that at the time of amending his return the sheriff was out of office.—*McClure v. Wells, Adm'r of Walker*, 311.
2. *Practice, civil—Suggestion of death suspends further proceedings, when.*—After suggestion of the death of plaintiff in a cause, no further steps could be taken therein, except upon voluntary appearance of a representative of the deceased, or upon *scire facias*. Until then, the effect of his death was to stop all further proceedings. A cause appealed to the Supreme Court in that shape will be dismissed.—*Murphy v. Redmond*, 317.
3. *Practice, civil—Proceedings under statute to reinstate judgment—Specific issues may be submitted to the jury.*—A proceeding under the statute (Wagn. Stat. 1137, §§ 14, 15) for the reinstatement of a judgment, whereof the record has been lost or destroyed, is not by motion, but upon petition and answer, as in ordinary cases at law; and the case need not be submitted to the court alone without the aid of a jury, nor need the opinion of the jury be taken upon the whole case, but the court is authorized by the statute (Wagn. Stat. 1041, § 18) to take their findings as to any specific questions of fact upon

## PRACTICE, CIVIL—(Continued.)

issues framed for that purpose, without being required to submit to them all the issues arising on the pleadings. The authority to do so is not limited to chancery proceedings.—*Besshears v. Rowe*, 501:

4. *Equity—Offset—Set-off or counter-claim.*—In regard to a set-off or counter-claim, equity usually follows the law, but not always. When an insolvent plaintiff is suing, equity will take jurisdiction of unliquidated claims, and allow offsets which would not be allowed in law. But a demand can not be set off any more in equity than in law, unless it existed against the plaintiff, in favor of the defendant, at the time of the commencement of the suit, and had then become due.—*Reppy v. Reppy*, 571.

See JUSTICES' COURTS, 1, 2, 5. PRACTICE, CIVIL—ACTIONS.

## PRACTICE, CIVIL—ACTIONS.

1. *Practice, civil—Res adjudicata—Set-off in one suit, not considered, may be afterward made an independent cause of action.*—In a suit upon a note, defendant's answer contained an equitable set-off; but at the trial defendant failed to appear, and the set-off was not considered. Defendant afterward brought his separate action for the set-off, but set forth no excuse—as fraud or mistake—for not having prosecuted his former set-off. *Held*, that his case must be treated as if no such defense had been attempted; and further, that the former suit would not be *res adjudicata*, so as to prevent defendant from bringing his separate action for the set-off. The former decision, in order to be a bar to an independent suit, must have been on the merits, and the matter set out must have been determined. If there were any doubt upon that point, it would be competent to prove by parol that the matters set up in the second petition had not been in fact submitted and passed on at the former trial.—*Wright v. Salisbury*, 28.
2. *Practice, civil—Actions—What will lie at law between partners.*—An action at law will lie by a partner against his co-partner, without a settlement of partnership accounts, for money received by the latter as plaintiff's agent and credited to him in an account disconnected with the affairs of the firm.—*Seaman v. Johnson*, 111.
3. *Practice, civil—Actions—Money paid—Mistake of law.*—Money paid with a full knowledge of the facts, but under a mistake of law, can not be recovered back.—*Mutual Savings Institution v. Enslin*, 200.
4. *Practice, civil—Actions on statute, penalty remedial—Petition must state what.*—It is only necessary for a party wishing to avail himself of a statute which is not purely penal, but is also remedial, to state facts which bring his case within its provisions. It is not necessary to conclude that the act complained of was done contrary to the form of the statute. But all the facts essential to support the action should be alleged, or in substance appear on the face of the petition. (*Wagn. Stat. 1345, § 1; Kennayde v. Pacific R.R. Co.*, 45 Mo. 255.)—*Hewitt v. Harvey*, 368.
5. *Trespass—Action for cutting away timber—Action on statute must set forth what.*—A petition founded on the statute touching trespass for cutting away timber, etc., which claims more than treble the alleged value of the timber, and fails to state that defendant has no interest or right in the timber carried away, or that it was taken from land not that of defendant, may be sufficient to give a common-law action, but can not be held to be a count on the statute.—*Id.*



## PRACTICE, CIVIL—ACTIONS—(Continued.)

6. *Practice, civil—Actions—Account—Rent.*—Where parties have mutual dealings, and rent from one to another becomes a subject of account between them, by mutual understanding and arrangement, it is recoverable in an action on account.—*Nedvidek v. Meyer*, 600.

See ASSIGNMENT, 1. JUSTICES' COURTS, 5. MANDAMUS. PARTNERSHIP.

QUO WARRANTO. SLANDER.

## PRACTICE, CIVIL—APPEALS.

1. *Supreme Court—Failure to prosecute appeal—Judgment affirmed.*—When it appears from the transcript of the judgment and proceedings in the Circuit Court that appellant has failed to prosecute his appeal within the time prescribed by law, the judgment of the Circuit Court will, on motion, be affirmed.—*Haeussler v. McBride*, 25.
2. *Practice, civil—New trial—Order of, not subject to appeal.*—An order granting a new trial can not be appealed from or made the subject of review in the appellate court; and this rule is not changed by section 1 of the act providing for the reorganization of the St. Louis Circuit Court. (Sess. Acts 1869, p. 16.) The "orders" referred to in that act are final orders, which dispose of a case and leave nothing further to be done.—*McDonough v. Nicholson*, 35.
3. *Practice, civil—Bill of exceptions—No point of law saved, finding will not be disturbed.*—A bill of exceptions showed that plaintiff excepted to the finding and judgment; but no instructions were asked or given. *Held*, that no point of law being saved, the Supreme Court will not review or disturb the finding of facts.—*Wilson v. North Missouri R.R. Co.*, 26.
4. Where appellant fails to file in the Supreme Court a statement and brief, judgment may be affirmed, with six per cent. damages.—*Rucker v. Robinson*, 37.
5. *Practice, civil—Bill of exceptions must specify rulings objected to.*—A bill of exceptions must clearly and distinctly advise the appellate court not only of the proceedings before the Circuit Court, but of each ruling of which the appellant complains, and that such ruling was excepted to at the time. Unless it shows such exceptions the bill is useless, and those errors only can be considered which are raised on the record proper by motion in arrest, if one be filed.—*Case v. Fogg*, 44.
6. *Practice, civil—Appeal can not be taken on mere voluntary non-suit.*—Plaintiff has no right of appeal upon a mere voluntary non-suit, to which he was not driven by any action of the court below.—*Poe v. Dominic*, 113.
7. *Practice, civil—Exceptions, bill of—Only matters patent on record noticed.*—Where no exceptions are preserved, only such matters as are patent on the face of the record proper will be noticed.—*Tupperry v. Hertung*, 135.
8. *Practice, civil—Appeal will lie only on final judgment.*—In a suit on a note, the answer alleged certain facts as a defense to so much of plaintiff's claim as called for interest. Plaintiff demurred to this defense, and the demurrer was overruled; and no reply being filed to the new matter set up in defense, judgment was entered on it as confessed. From this final judgment no appeal was taken; but after the cause had been heard on its general merits, and final judgment had been rendered, the case was appealed on the judgment on demurrer. *Held*, that such an appeal would not lie. When a demurrer goes to the entire cause of action or ground of defense, and the

## PRACTICE, CIVIL—APPEALS—(Continued.)

- party chooses to stand upon it notwithstanding an adverse ruling, he may do so, and allow final judgment to go against him upon the whole case, taking his appeal from such final judgment. He can not, however, divide the case into parts and carry it up in fragments, and especially when the final judgment is allowed to stand unaffected by the appeal.—*Anderson v. Moberly*, 191.
9. *Appeal*.—An appeal on writ of error, to be effective, must operate upon a final judgment, and not upon one interlocutory in its character.—*Id.*
10. *Practice, civil—District Court—Filing transcript—Duty of appellant*.—The filing of transcript in the office of the clerk of the District Court, at least fifteen days before the term to which an appeal is returnable, is a personal duty imposed upon the appellant (Gen. Stat. 1865, p. 547, § 29) which he can not transfer to the clerk; and in the event of his failure, the judgment, on motion of respondent, should be affirmed; and it will not avail appellant that he had several times asked the circuit clerk to make it out and send it up, and that the latter had promised to do so.—*Caldwell v. Hawkins*, 263.
11. *Practice, civil—Supreme Court, objections raised in for first time come too late—Account—Justice's court*.—Where a transcript from a justice's court stated that plaintiff filed an account in the case, and judgment on the appeal trial in the Circuit Court found that plaintiff had sustained damages as alleged in his complaint, and the objection that plaintiff failed to file his account was raised for the first time in this court, the objection comes too late.—*Fisher v. Pacific R.R. Co.*, 304.
12. *Practice, civil—Bill of exceptions—Motion for new trial and arrest of judgment*.—Where defendant appeals without motion for a new trial, or in arrest of judgment, this court is limited to questions arising on the face of the record, and will not consider those presented only by bill of exceptions.—*Collins v. Saunders*, 389.
13. *Practice, civil—Supreme Court will not weigh evidence*.—In law cases the Supreme Court will not undertake to weigh the evidence.—*Markle v. Langer*, 393.
14. *Attachment—Plea in abatement, appeal will not lie from judgment on*.—Under the present statute (Wagn. Stat. 190, § 42)—amendment of act of 1855 (R. C. 1855, p. 252, § 47)—an appeal will not lie from the judgment of court upon a plea in abatement. (*Anderson v. Moberly*, ante, p. 191.)—*Davis v. Perry*, 449.

See COURTS, COUNTY, 3. JUSTICES' COURTS, 2. PRACTICE, CIVIL, 2.  
PRACTICE, CIVIL—PLEADINGS, 1.

## PRACTICE, CIVIL—PARTIES.

1. *Husband and wife—Separate property of wife—Husband should be joined in suits concerning—Otherwise where property is simply that of wife*.—Where property is simply that of the wife, and not her separate property, whether conveyed to a trustee for her use or to her directly, the husband would have a marital interest, of which he could not be divested without his consent; and in suits pertaining to such property, he should be joined as a party. But her separate estate, on every rule governing it, must be considered as held by her, divested of any interest in the husband, and he need not be made a party to actions affecting it.—*Boal, Adm'r of Dugan, v. Morgner* 48.  
See ASSIGNMENT, 1. PRACTICE, CIVIL, 2.

## PRACTICE, CIVIL—PLEADINGS.

1. *Practice, civil—New trial, motion for—Sunday never included in computing number of days.*—Under our statute a service of fifteen days before term, excluding Sundays, is not necessary to bring a party into court; but it is the well-settled rule of common law that, as to matters to be transacted in court, Sunday is *non dies*, and should not be counted. In moving for new trial, or in arrest, a party should be entitled to four working days after trial if the term shall so long continue; and this rule is not annulled by the operation of the statute (Wagn. Stat. 888, § 6).—*National Bank of the Metropolis v. Williams*, 17.
2. *Practice, civil—Pleadings—Defects cured by verdict under present system of pleading.*—A petition, while claiming specified damages for trover of certain goods, did not in the body of it state the value of the goods converted, but, after a general description, referred to an exhibit filed "for a more accurate description and the values." *Held* that, under the increased liberality of our present system of pleading, the defect was cured by verdict.—*Case v. Fogg*, 44.
3. *Practice, civil—Pleadings—Amended answer, etc.*—A defendant, by filing an amended answer and going to trial upon it, abandons his first answer and the matters therein alleged, which were not re-stated in the answer as amended.—*Ticknor v. Voorhies*, 110.
4. *Practice, civil—Answer defective for indefiniteness.*—In a suit on a draft, the answer asserted that, by the laws of Louisiana, all right of action upon the draft sued on was extinguished prior to the institution of the suit. *Held*, that the answer was defective in failing to set out the facts which operated the extinguishment, and in failing to specify the laws relied on.—*Id.*
5. *Partition—Petition—Allegations, what sufficient.*—In a partition suit, allegations of seizin in the ancestor and descent to the heirs are, *prima facie*, sufficient to vest both title and possession in the latter.—*Tuppery v. Hertung*, 135.
6. *Partition—Under act of 1865, attorneys could not stipulate for judgment in what cases.*—Where the answer in a suit for partition stated, among other things, that administration had not been closed on the estate sought to be partitioned, and that there were not sufficient personal assets to pay the debts of the deceased, the attorneys of record, under the partition act of 1865 (Gen. Stat. 1765, ch. 152, § 51), had no power to stipulate that judgment of partition should be rendered, even though it was further agreed that the proceeds arising from the sale under the partition should be subject to the debts of the deceased.—*Id.*
7. *Practice, civil—Slander—Action for, need not state what.*—A petition in an action for slander is not fatally defective, under the present statute (2 Wagn. Stat. 1020, § 43), because it contains no allegation that the slanderous words were uttered in the presence of any one, or, being spoken in a foreign language, that they were understood by those present.—*Atwinger v. Feliner*, 276.
8. *Practice, civil—Petition—Requirement that instrument of writing be filed with, does not include subscription papers.*—A certain subscription paper, signed by above forty subscribers, was made the foundation of an action against one of them to compel payment of his subscription. *Held*, that the statute requiring the filing of instruments of writing in certain cases with the



**PRACTICE, CIVIL—PLEADINGS—(Continued.)**

petition (Wagn. Stat. 1022, § 51) was never intended to include such cases. It was not meant to include articles of association and subscriptions.—*Workman v. Campbell*, 805.

9. *Practice, civil—Actions on statute, penalty remedial—Petition must state what.*—It is only necessary for a party wishing to avail himself of a statute which is not purely penal, but is also remedial, to state facts which bring his case within its provisions. It is not necessary to conclude that the act complained of was done contrary to the form of the statute. But all the facts essential to support the action should be alleged, or in substance appear on the face of the petition. (Wagn. Stat. 1845, § 1; *Kennayde v. Pacific R.R. Co.*, 45 Mo. 255.)—*Hewitt v. Harvey*, 868.
10. *Trespass—Action for cutting away timber—Action on statute must set forth what.*—A petition founded on the statute touching trespass for cutting away timber, etc., which claims more than treble the alleged value of the timber, and fails to state that defendant has no interest or right in the timber carried away, or that it was taken from land not that of defendant, may be sufficient to give a common-law action, but can not be held to be a count on the statute.—*Id.*
11. *Practice, civil—Amendment of caption to petition, when ground for reversal.*—The action of court in allowing an amendment to the caption of a petition after the evidence is in, is a matter resting very much within its sound discretion, and would be no ground of reversal unless shown to operate very much to the prejudice of the other party.—*State ex rel. Moore v. Sandusky*, 377.
12. *Practice, civil—Pleading—Warranty, what amounts to.*—A petition substantially sets out a cause of action for a warranty which shows a representation or positive and unequivocal affirmation by defendant as to the state and quality of the thing sold, on the faith of which plaintiff made the purchase and paid the consideration. The word "warrant" need not be set out, or any other particular phraseology, in order to constitute a warranty.—*Carter v. Black*, 384.
13. *Mandamus, demurrer to treated as answer—Waiver.*—In proceedings in *mandamus*, where respondent filed a demurrer to the petition instead of an answer to the writ, and relator agreed to accept the demurrer as a return to the writ, and demurred to it accordingly, his agreement and subsequent action constituted a substantial waiver of his objections to the technical correctness of the pleadings.—*Ensworth v. Albin*, 450.
14. *Practice, civil—Answers, party can not have two in same case at same time.*—Defendant can not have two answers pending in the same case at the same time—one principal and the other supplementary.—*Nedvidek v. Meyer*, 600.
15. *Practice, civil—New trial, motion for—Newly-discovered evidence—Impeachment of witness.*—A new trial will not be granted for newly-discovered testimony if its only object is to assail or impeach the credibility of a witness.—*Phillips, Adm'r, v. Phillips*, 607.

See AGENCY, 4. FRAUDULENT CONVEYANCES, 2. JUSTICES' COURTS, 5. SLANDER, 1, 2, 3.

**PRACTICE, CIVIL—TRIALS.**

1. *Practice, civil—Continuances.*—The ruling of the court below upon motions for continuances is seldom interfered with by the Supreme Court,

## PRACTICE, CIVIL—TRIALS—(Continued.)

- as it is a matter resting in their discretion; and in every case the ruling is entitled to every intendment in its favor.—*Frederick v. Rice*, 24.
2. *Practice, civil—Continuances—Rules of Circuit Court.*—The rule of the St. Louis Circuit Court, which requires the party applying for a continuance to state certain things in his affidavits, is founded in wisdom, and is necessary to prevent frivolous applications and ruinous delays.—*Id.*
  3. *Practice, civil—Res adjudicata—Set-off in one suit, not considered, may be afterward made an independent cause of action.*—In a suit upon a note, defendant's answer contained an equitable set-off; but at the trial defendant failed to appear, and the set-off was not considered. Defendant afterward brought his separate action for the set-off, but set forth no excuse—as fraud or mistake—for not having prosecuted his former set-off. *Held*, that his case must be treated as if no such defense had been attempted; and further, that the former suit would not be *res adjudicata*, so as to prevent defendant from bringing his separate action for the set-off. The former decision, in order to be a bar to an independent suit, must have been on the merits, and the matter set out must have been determined. If there were any doubt upon that point, it would be competent to prove by parol that the matters set up in the second petition had not been in fact submitted and passed on at the former trial.—*Wright v. Salisbury*, 26.
  4. *Mandamus—Verdict—Costs—Surplusage—New trial.*—A verdict in these words, "We, the jury, find for the defendants, they to pay the costs of this suit," is a good and complete verdict. That part of it relating to the costs was merely void, and should have been regarded as surplusage. A circuit judge refusing to receive such a verdict may be compelled to do so by proceedings in *mandamus*. But plaintiffs in the suit will have leave to file their motion for a new trial in the same manner as if the verdict had been received and entered at the proper time.—*State ex rel. Webster v. Knight*, 83.
  5. *Practice, civil—Evidence—Laws of sister States must be proved like other facts.*—In the trial of a cause, the laws of another State are to be given in evidence like any other facts; and when the record shows no evidence proving them, instructions based on them are properly refused.—*Babcock v. Babcock*, 243.
  6. *Practice, civil—Evidence—Rebuttal—New matter can not be gone into.*—A party can not go into proof of new and independent matter in rebuttal, and courts are fully warranted in excluding evidence of this description.—*Id.*
  7. *Practice, civil—Evidence—Surprise—New trial—Nonsuit.*—A plaintiff, after verdict, can not have a new trial on account of having been surprised by evidence of defendant. If unprepared to meet defendant's evidence, he should suffer a nonsuit, after which he may sue again for the same cause of action.—*Savoni v. Brashear*, 345.
  8. *Practice, civil—Continuance, affidavit for—Diligence.*—Where a cause was continued from one term to another, and no orders were made for the issuing of subpoenas for witnesses till three days before the second time set for trial, an affidavit which showed, in addition, merely that the applicant for continuance on one occasion "searched all through" the town where witness resided without being able to find him, showed no sufficient diligence.—*State v. Murphy*, 430.

See INSURANCE, FIRE AND MARINE, 3



## PRACTICE, CRIMINAL.

1. *Practice, criminal—Jury—Panel, incomplete—Not ground of reversal, when.*—The Supreme Court will not reverse a conviction for murder on the ground that the panel of jurors was not full, where the trial progressed without any objection, and it was not shown that defendant was deprived of the privilege of making the full number of statutory challenges, or that he suffered the least prejudice from the course pursued.—*State v. Klinger*, 224.
2. *Practice, criminal—Jury—Demand of list of jurors a privilege, and which may be waived.*—In criminal prosecutions, the delivery of a list of jurors to the prisoner forty-eight hours before trial, under section 8, p. 1102, Wagner's Statutes, is a privilege extended to the accused for his benefit, and if he does not make the demand or require the list he is presumed to have waived it.—*Id.*
3. *Practice, criminal—Sanity—Evidence—Testimony of experts, when improper.*—In a murder trial, counsel for defendant put to a medical expert the following question: "When the defendant has been undeniably subject to fits of epilepsy, should he not have the benefit of every reasonable doubt that might arise as to his sanity?" *Held*, that the question was properly ruled out, as it substituted the witness in the place of the court and the jury, and made him the judge of the weight and effect of evidence.—*Id.*
4. *Practice, criminal—Evidence—Medical experts, facts being disputed, can only testify on hypothetical facts—Witnesses not experts can not give an opinion from evidence in a cause.*—A medical expert, who has been present during a trial and heard all the evidence, there being no dispute about the facts, may be asked his opinion about the whole matter; but when the facts are disputed, this course of interrogation is inadmissible, and the question should be stated hypothetically. And witnesses not experts may give their opinion, accompanied by the facts existing within their knowledge and observation, but they can not be permitted to give an opinion upon the question whether a hypothetical state of facts would or would not, if true, be evidence of insanity, nor from mere evidence which they have heard other witnesses detail.—*Id.*
5. *Statute, construction of—Insanity—Restraint after acquittal, on ground of.*—The statute restraining prisoners who are acquitted on the ground of insanity, has reference solely to insanity existing at the time of the trial, and then it is a question exclusively for the determination of the court, with which neither the jury nor counsel have anything to do.—*Id.*
6. *Practice, criminal—Counsel should not be permitted to read law to the jury, when.*—Whether counsel will be allowed to read books to the jury, is a matter resting within the discretion of the court; but a court ought never to permit an attorney to read the law to a jury when the inevitable effect would be to mislead.—*Id.*
7. *Practice, criminal—Change of venue, notice of application for—Not presumed, when.*—This court will not presume that notice of an application for change of venue in a criminal cause was given the prosecuting attorney (Wagn. Stat. 1097, § 19) from the mere fact that the trial court passed upon the application and decided against it, where it does not appear from the record that such attorney was present either to waive notice or to object to its sufficiency.—*State v. Grable*, 350.

## PRACTICE, CRIMINAL—(Continued.)

8. *Practice in criminal cases—Indictment—Court being uncertain where offense was committed, may instruct jury, how.*—In a criminal indictment, the court being in doubt in which of a number of counties mentioned in the testimony the offense was committed, may properly instruct the jury, under the statute (Wagn. Stat. 1087, § 8), to find that the offense was committed in the county over which it had the jurisdiction.—*Id.*
9. *Criminal law—False pretenses, obtaining money under—Indictment for, should set out what.*—Where money or other property is obtained by sale or exchange of property effected by means of false pretenses, such sale or exchange ought to be set forth in the indictment; and the false pretenses should be alleged to have been made with a view to effect such sale or exchange; and it should be averred that by reason thereof the party was induced to buy or exchange. For failure to set out these allegations, the indictment should be quashed.—*State v. Bonnell*, 395.
10. *Criminal law—Insanity to be determined like any other fact.*—In the trial of a criminal case, the burden of establishing the insanity of the accused to the satisfaction of the jury rests upon the defense; but it is unnecessary that his insanity should be established beyond a reasonable doubt. All symptoms and tests of mental disease are purely matters of fact for the jury, and to be determined like other facts; and it is sufficient if the jury are reasonably satisfied from the weight or preponderance of evidence that the accused was insane at the time of the commission of the act. (*State v. Klinger*, *ante*, p. 224.) And an instruction which requires a *clear* preponderance of evidence to establish sanity introduces a qualification not warranted by law, and calculated to mislead.—*State v. Hundley*, 414.
11. *Criminal law—Temporary insanity caused by intoxication, responsibility for.*—Temporary insanity, produced immediately by intoxication, does not destroy responsibility for crime where the patient, when sane and responsible, made himself voluntarily drunk; but, to be punishable, the crime must be the immediate result of the fit of intoxication, and while it lasts, and not the result of insanity remotely occasioned by previous bad habits. In the latter case insanity is entitled to the same consideration as when arising from any other cause.—*Id.*
12. *Practice, criminal—Court can not instruct on weight and sufficiency of evidence.*—Under the present statute relating to practice in criminal cases (Wagn. Stat. 1106, § 30), it is error for a court to single out certain testimony in a cause and tell the jury that it is entitled to great or little weight. It is for the court to determine upon the legitimacy and appropriateness of the evidence, but the jury are the sole and exclusive judges of the credit and weight that is to be attached to it.—*Id.*
13. *Crimes and punishments—Evidence as to facts after the commission of the act, showing animus.*—In the trial of an indictment for willfully and maliciously killing a hog, evidence on the part of the accused, showing his animus and intention, was competent in establishing his innocence, although it embraced facts subsequent to the killing.—*State v. Graham*, 490.
14. *Indictment, sufficiency of—Informality.*—An indictment, although technically faulty and unscientific, yet if the averments required by the statute are sufficiently made, will be substantially good. (Wagn. Stat. 1090, § 27.)—*State v. Coulter*, 564.

## PRACTICE, CRIMINAL—(Continued.)

15. *Criminal law—Indictment—Larceny—Evidence—Confession, when not voluntary and inadmissible.*—Under an indictment for larceny it appeared that defendant A. was a young man; that the prosecutor, B., a strong and vigorous man, who had been his former master, charged him with stealing his property, which charge A. denied; whereupon B. said he knew better; that he knew all about it, and that A. had better own up. A. then inquired whether, if he did confess, he would be let alone and not prosecuted. B. replied that he would make no promises; that he would not say whether he would let him go or not; but that he might as well own up, and that it would be better for him. A. then said he would tell all about it. No other persons were present. B. then reduced the confession to writing, and the next morning, A. denying its truth and demanding the delivery of the paper, he was arrested and indicted. *Held*, that, considering the relative situation of the parties, such a charge and assertion of knowledge of B.'s guilt were manifestly calculated to produce fear and intimidation; and that, although no positive promise was made, an allurements was held out which excited hope. And *held*, that a confession under such circumstances was not a voluntary one, such as, of itself, to warrant a conviction; not only so, but it was inadmissible, and should not have been given in evidence.

When a confession is forced from the mind by the torture of fear or the flattery of hope, it comes in such a questionable shape that it should be wholly rejected.—*State v. Brockman*, 566.

16. *Criminal law—Information for selling intoxicating liquors—Allegata and probata.*—Where an information for selling intoxicating liquors in quantities less than ten gallons, charged that the sales were made "to A. and divers other persons to informant unknown," and the evidence showed sales to other parties, but none to A., the variance between the pleadings and proofs was immaterial.—*State v. Wolff*, 584.

See PRACTICE, SUPREME COURT, 9.

## PRACTICE, SUPREME COURT.

1. *Supreme Court—Failure to prosecute appeal—Judgment affirmed.*—When it appears from the transcript of the judgment and proceedings in the Circuit Court that appellant has failed to prosecute his appeal within the time prescribed by law, the judgment of the Circuit Court will, on motion, be affirmed.—*Haeussler v. McBride*, 25.

2. *Practice, civil—Bill of exceptions—No point of law saved, finding will not be disturbed.*—A bill of exceptions showed that plaintiff excepted to the finding and judgment, but no instructions were asked or given. *Held*, that no point of law being saved, this court will not review or disturb the finding of facts.—*Wilson v. North Missouri R.R. Co.*, 36.

3. Where appellant fails to file in the Supreme Court a statement and brief, judgment may be affirmed, with six per cent. damages.—*Rucker v. Robinson*, 37.

4. *Practice, civil—Bill of exceptions must specify rulings objected to.*—A bill of exceptions must clearly and distinctly advise the appellate court not only of the proceedings before the Circuit Court, but of each ruling of which the appellant complains, and that such ruling was excepted to at the time. Unless it shows such exceptions the bill is useless, and those errors only can be considered which are raised on the record proper by motion in arrest, if one be filed.—*Case v. Fogg*, 44

## PRACTICE, SUPREME COURT—(Continued.)

5. *Practice, civil—Supreme Court—Penalty of ten per cent. damages applies to what cases.*—The penalty of ten per cent. damages awarded in the Supreme Court has been usually confined to appeals for delay merely from judgments on contracts—to collection cases; and that court is not inclined to extend it to suits for false and fraudulent representations unless special reasons appear.—Boal, Adm'r of Dugan, v. Morgner, 48.
6. *Practice, civil—Supreme Court, objections raised in for first time come too late—Account—Justice's court.*—Where a transcript from a Justice's court stated that plaintiff filed an account in the case, and judgment on the appeal trial in the Circuit Court found that plaintiff had sustained damages as alleged in his complaint, and the objection that plaintiff failed to file his account was raised for the first time in this court, the objection comes too late.—Fisher v. Pacific R.R. Co., 304.
7. *Practice, civil—Supreme Court will not determine credibility of witnesses.*—The jury are the proper judges to determine the credibility of witnesses, and this court will not interfere with their verdict when the appeal raises the simple question of the weight of testimony.—State v. Murphy, 347.
8. *Practice, civil—Supreme Court will not weigh evidence.*—In law cases the Supreme Court will not undertake to weigh the evidence.—Markle v. Langner, 303.
9. *Practice—Supreme Court—Transcript—Clerk—Affirmance.*—On *superseades* in a criminal prosecution, where the clerk of the trial court sends up the transcript as required by statute (Wagn. Stat. 1114-15, § 16), but the appellant fails to prosecute his appeal, and the judgment of the lower court appears to be regular, it will be affirmed. But the duty of bringing up the transcript is personal to the clerk, without the application of the accused (45 Mo. 153); and *semble*, that where respondent brings in the transcript and moves for an affirmance, on the ground that appellant has failed to file it, the motion will be overruled.—State v. Armstrong, 588.

See PRACTICE, CIVIL, 2. PRACTICE, CIVIL—APPEAL, 1—TRIALS, 1.

## PRESUMPTIONS.

See EVIDENCE. RAILROADS, 1. WILLS, 2, 3.

## PRINCIPAL AND AGENT

See AGENCY.

## PROCESS.

See PRACTICE, CIVIL, 1.

## PROTEST.

See BILLS AND NOTES.

## PUBLIC PRINTER.

1. *Public printer—Mandamus—Act of March 23, 1870 (Wagn. Stat. 1127, §§ 29, 30), does not impair the obligation of a contract.*—The act of March 23, 1870 (Sess. Acts 1870, p. 85), abolishing the office of public printer after May, 1870, with the proviso that the then incumbent might continue the printing at a price twenty per cent. less than that before allowed by law, was not unconstitutional, as impairing the obligation of a contract, because, first, that office being a statutory one, may be controlled, modified, or abolished by law, and the officer goes out or holds on, subject to any change in the law; second, even were the office a franchise, it would be subject to all the condi-



## PUBLIC PRINTER—(Continued.)

tions and reservations of the act creating it, and that act (Gen. Stat. 1865, ch. 20, § 30) contains an express reservation of the right to amend, modify, or repeal it at pleasure. The act providing for said deduction is not to be considered as a modification of the original act as to price, but as a tender of the work for a given period, and hence is not unconstitutional within the spirit of section 23, article 4, of the State constitution.—*Wilcox v. Rodman*, 323.

## Q

## QUO WARRANTO.

1. *Quo warranto*—*Information*—*Sufficiency of interest of relator*.—The enactment that informations in the nature of a *quo warranto* may be exhibited at the relation of any person desiring to present the same (Wagn. Stat. 1133, § 1) means any person having an interest in the subject of the prosecution. (State ex rel. Hequembourg v. Lawrence, 38 Mo. 535, cited and affirmed.)—State ex rel. Kempf v. Boal, 528.
2. *Quo warranto*—*Information*—*Interest of relator*.—An information in the nature of a *quo warranto*, to decide as between two parties which has the better right to a certain office, must show affirmatively that the relator has a title to the office, if the defendant's title be defeated, and therefore must show that the relator possessed all the requisite qualifications for the office.—*Id.*

## R

## RAILROADS.

1. *Corporations*—*Railroads*—*Negligence*—*Public highways*—*Citizen may presume what*.—The citizen who, on a public highway, approaches a railroad track and can neither see nor hear any indications of a moving train, is not chargeable with negligence in assuming that there is no car sufficiently near to make the crossing dangerous. He has a right to presume that in handling their cars the railroad companies will act with appropriate care, and that the usual signals of approach will be reasonably given. (*Kennayde v. Pacific R.R. Co.*, 45 Mo. 255, affirmed.)—*Tabor v. Missouri Valley R.R. Co.*, 353.  
See CONTRACTS, 9, 10. DAMAGES

## RECORDS.

See CONVEYANCES, 3, 6. JUSTICES' COURTS, 5.

## REGISTRATION.

See ELECTIONS, 1.

## REPLEVIN.

1. *Replevin*—*Crops*—*Defendant's right to, under license of plaintiff*.—In replevin for certain wheat, where the answer, after traversing the issue presented, alleged title in defendant under one of plaintiff's tenants, who was claimed to have grown the wheat on plaintiff's premises, the *onus* would be on plaintiff to establish his title to the wheat, and to show its wrongful detention; and it would be competent for defendant to rebut and disprove the case, as made by plaintiff, by showing title in himself from the tenant, although the latter may have been the mere licensee, and not the lessee, of plaintiff.—*Morgner v. Biggs*, 65



## REPLEVIN—(Continued.)

2. *Justice's court—Replevin—Statement—Venue.*—In suit for replevin before a justice, the statement that plaintiff was the owner and entitled to the possession of the property is sufficient, without an averment that plaintiff was lawfully entitled to it; and the venue is sufficiently laid if it appear in the margin.—*Stokes, Adm'r, v. Crane*, 264.

## RES ADJUDICATA.

See JUDGMENT, 3. LANDLORD AND TENANT, 7, 8. PRACTICE, CIVIL—ACTIONS, 1.

## RES GESTÆ.

See BILLS AND NOTES, 1.

## REVENUE.

1. *Land and land titles—Tax sales—Land assessed in wrong name, sale invalid.*—In ejectment for land bought at a tax sale, where it appeared that the assessment was made and judgment rendered in the name of one not the owner, *held*, that the advertisement was no notice to defendant; that there was no valid judgment, and that plaintiff acquired no title by the sale. (*Abbott v. Lindenbower*, 43 Mo. 162, affirmed.)—*Hume v. Wainscott*, 145.
2. *Revenue—Tax sales—Abbott v. Lindenbower*, 42 Mo. 162, did not attempt to anticipate all objections to.—The true spirit and meaning of the decision in *Abbott v. Lindenbower*, 42 Mo. 162, was simply that certain things were essential to the valid exercise of the taxing power, and could not be dispensed with by the Legislature; and that, in defending against the effect of a tax deed, the want or omission of them might be shown in evidence, notwithstanding the statute (*Gen. Stat. 1865*, p. 127, §§ 111-12); but that decision did not attempt to specify all the things that were so essential—to anticipate all possible objections to every tax sale.—*Abbott v. Lindenbower*, 291.
3. *Revenue—Tax deeds prima facie evidence of title.*—A tax deed is *prima facie* evidence of facts necessary to constitute title, and the onus is thrown upon him who would attack its validity.—*Id.*
4. *Revenue, county—Contract—Interest.*—A contractor with a county for the building of a bridge would be entitled to interest on payments deferred after his fulfillment of his contract.—*Risley v. Andrew County*, 382.
5. *Revenue—County collector—Failure to pay amount found in arrears, or to comply with order of court—Construction of statute.*—A county collector found in arrears by the County Court, and failing to comply with the order of court issued pursuant to statute (*Wagn. Stat. 412, § 22*), for the payment of the amount due, or to appear at the first day of the next term, to protect his rights (§§ 23-4), has no appeal from a judgment of court thereupon rendered against him for the amount in default. (See generally sections 19 *et seq.*)—*Andrew County v. Owens*, 386.
6. *Revenue—School taxes, collection of—Injunction to restrain, contains no equity.*—A bill for injunction to restrain a county collector from collecting school taxes alleged to have been irregularly and fraudulently levied, contains no equity, and should be dismissed. If the assessment be void it will not protect the officer, nor will a sale under it divest the plaintiff of his property. The wrong can be fully compensated, and the injury is not in any sense irreparable.—*Barrow v. Davis*, 394.

## REVENUE—(Continued.)

7. *Revenue—State collector defaulting, sureties of—Money deposited by collector, recovered by surety in garnishment proceedings, will be held in trust for remaining sureties, when.*—After the debt due by a defaulting principal has been paid by his sureties, in ratable proportions, each of them becomes an independent creditor of the principal, and if any one should succeed in collecting his debt, the other creditors would have no claim whatever upon that fund.

But when the principal is a State collector the rule is different. The moment collections come into his hands they become the property of the State. Under the law (Sess. Acts 1863, p. 76, § 49) it became his duty to deposit them in the Bank of the State of Missouri; but his failure to do so would not operate to divest the State of its specific interest, and it might follow the fund, by suitable action, into any bank where deposited, and fasten upon the account created by it. Nor can the requirement of his official bond, with summary remedy upon default, be construed as divesting the title of the State to that fund. Such a deposit becomes a debt to the State, and none the less so because the collector might have discharged it by drawing out the money. And where the sureties on the collector's bond were compelled to pay out a liability on his part which this fund, if collected, would have gone to extinguish, it should, in equity, be transferred to such sureties.

Hence, if one of the sureties brings suit against the collector for the ratable share paid out by him, and recovers the sum by garnishment against the bank where the fund was deposited, on every principle the sum should be held by him as trustee for the use of all the sureties as the equitable owners, and no superior diligence on the part of the attaching surety could despoil the others. It is not as among equal judgment creditors, where the first levy gives the priority; for in that case there is no ownership, but only a lien, and the levy and sale become necessary to transfer the property. But the surety, in making contribution, will be entitled to deduct the costs and expense incurred by him in collecting the amount.—*Harrison v. Phillips*, 520.

8. *Revenue—Taxation on private vehicles—Ordinance 7127 not authorized by section 19, p. 63, Sess. Acts 1867.*—The provision of the charter of the city of St. Louis, empowering the mayor and city council to license, tax, and regulate horse railroads, hackney carriages, etc. (Sess. Acts 1867, p. 63, § 19), was intended to apply solely to a class who transact business for the public, and hold themselves out to the community as seeking public employment, and was not designed to extend to vehicles used by persons for their own convenience, or in the transaction of their own private business, and not engaged in any public employment for which compensation is received. And under that provision the city council had no authority to pass ordinance 7127, compelling persons to take out licenses for vehicles used by them for exclusively private purposes.—*The City of St. Louis v. Grone*, 574.
9. *Revenue—Ordinance for macadamizing street—Certified tax bill—Evidence.*—An ordinance which simply authorizes the macadamizing of a particular street between given points, without furnishing any directions as to the manner of doing the work, is insufficient to sustain an action by a city contractor on a certified tax bill against the owner of property adjoining the street so improved. (See *Sheehan v. Gleeson*, ante, p. 100.)

Under the act of 1860 (Adj. Sess. Acts 1859-60, p. 383), plaintiff in such

## REVENUE—(Continued.)

a suit might make out a *prima facie* case, independent of the ordinance, by putting in evidence the tax bills; but under the act of 1866 (Sess. Acts 1866, p. 296) the tax bill would not be even *prima facie* evidence of the validity of the claim, but only of the fact that the work had been done as claimed. — *Haegele v. Mallinekrodt*, 577.

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## ST. LOUIS, CITY OF.

1. *City engineer—Discretion of, can not be delegated.*—In making city improvements, the discretion conferred upon one class of officers can not be transferred to another.—*Sheehan v. Gleeson*, 100.
2. *Ordinances, city of St. Louis—Engineer—Curbstones—Nature of stone and precise dimensions and manner of dressing need not be specified.*—Section 14 of ordinance 5399 of the city ordinances of St. Louis, in fixing a minimum of thickness and depth of curbstones, was sufficiently specific to authorize proceedings under it by the engineer. The precise thickness of the curbstones need not be given, nor the nature of the stone nor the manner of dressing it. An ordinance may lack desirable precision, and still may so provide for the manner in which an improvement shall be made, and be such compliance with the law, although a loose one, that the courts would not be authorized to invalidate the action of city officers under it.—*Id.*
3. *St. Louis Gas Company—Contract for gas—Gas furnished St. Louis in extended limits—Estoppel.*—In suit by the St. Louis Gaslight Company against the city of St. Louis, for amount claimed as due for gas furnished defendant in its enlarged boundaries, where it appeared that without dispute, and for a long series of years, plaintiff had claimed and exercised, and been supported in, the exclusive right of occupying, under a certain contract, the new as well as old city limits, held, that it should be estopped from seeking to limit its operation for the purposes of the suit.—*The St. Louis Gaslight Co. v. The City of St. Louis*, 121.
4. *Revenue—Taxation on private vehicles—Ordinances 7127 not authorized by section 19, p. 63, Sess. Acts 1867.*—The provision of the charter of the city of St. Louis, empowering the mayor and city council to license, tax, and regulate horse railroads, hackney carriages, etc. (Sess. Acts 1867, p. 63, § 19), was intended to apply solely to a class who transact business for the public, and hold themselves out to the community as seeking public employment, and was not designed to extend to vehicles used by persons for their own convenience, or in the transaction of their own private business, and not engaged in any public employment for which compensation is received. And under that provision the city council had no authority to pass ordinance 7127, compelling persons to take out licenses for vehicles used by them for exclusively private purposes.—*The City of St. Louis v. Grone*, 574.
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## ST. LOUIS, CITY OF—(Continued.)

Under the act of 1860 (Adj. Sess. Acts 1859-60, p. 383), plaintiff in such a suit might make out a *prima facie* case, independent of the ordinance, by putting in evidence the tax bills; but under the act of 1866 (Sess. Acts 1866, p. 296) the tax bill would not be even *prima facie* evidence of the validity of the claim, but only of the fact that the work had been done as claimed.—*Haegele v. Mallinckrodt*, 577.

6. *Ordinances* — “*Tavern*,” meaning of term.—The Legislature, in making use of the word “*tavern*” in the revised charter of the city of St. Louis (Sess. Acts 1867, p. 63, § 18), undoubtedly and manifestly intended to make it comprehend all hotels and houses which entertain and accommodate the public for compensation, even though they may not have the privilege of selling liquors.—*The City of St. Louis v. Siegrist*, 593.

## SALES.

1. *Vendor's lien, where legal title is in vendor, a proceeding to foreclose vendee's equity*—*Equity may be sold under order of sale analogous to fi. fa.*—Where the legal title to real estate is in the vendor, proceedings to enforce his lien for the purchase money are not strictly such, but rather proceedings to foreclose the vendee's equity. If there is to be a sale, the proper way is to order the sale of the property, as in case of mortgages; but if a court should order defendant's equity to be sold, it would not be a void proceeding. And though the order of sale be analogous to a *fi. fa.* instead of to an order upon a mortgage, it would be valid and pass the equity.—*Gaston v. White*, 486.
2. *Judgment—Vendor's lien—Administrator—Revisor—Construction of statute.*—Where the vendor of real estate obtains a judgment to enforce his lien for the purchase money, and sues out execution, but dies prior to sale thereunder, a special execution, under the present statute (Wagn. Stat. 791, § 14), may be issued in the name of his administrators, without a revival of the judgment.—*Id.*

See AGENCY, 2, 3. EVIDENCE, 17. FRAUDULENT CONVEYANCES. SHERIFFS' SALES.

## SATISFACTION OF JUDGMENT.

See JUDGMENTS, 2.

## SCHOOLS.

See CORPORATIONS, 4. REVENUE, 6.

## SEPARATE ESTATE.

See HUSBAND AND WIFE.

## SET-OFF.

See PRACTICE, CIVIL, 4. PRACTICE, CIVIL—ACTIONS, 1.

## SERVANTS.

See DAMAGES, 3.

## SERVITUDES.

See EXCAVATIONS.

## SHERIFF.

1. *Sheriff—Return made in name of deputy insufficient—May be amended after judgment, when.*—A return of process signed “John Butler, deputy sheriff,” is insufficient to give the Circuit Court jurisdiction of the person of the defendant. But it may be amended in aid of judgment, on reversal of the cause, so as to make the return in the name of the principal sheriff; and it

**SHERIFF—(Continued.)**

makes no difference that at the time of amending his return the sheriff was out of office.—*McClure v. Wells, Adm'r*, 311.

See **SHERIFFS' SALES**.

**SHERIFFS' SALES.**

1. *Sheriff's sale—Imposture at, title under worthless.*—The title of a purchaser at a sheriff's sale, who practices any deceit or imposture, or who is guilty of any trick or device, the object of which is to get the property at an under-value, is void and utterly worthless.—*Turner v. Adams*, 95.
2. *Ejectment—Executions—Sheriff's amendment of return allowed, when.*—The return upon an execution omitted to describe the real estate sold, but the sheriff's deed conveying the land described it minutely. In ejectment brought many years afterward against the original defendants in execution, *held*, that the sheriff not being dependent on his memory, but being furnished by the deed with the means of accurately supplying the defects, might amend his return so as to make it show what lands were sold and who was the purchaser. And this he might do although out of office; but *semble*, that the case would be otherwise where the rights of innocent purchasers might be affected. The suit being instituted long after the date of the return, the court properly refused to permit defendants to examine the sheriff as to his personal recollection of the facts of his return.

There is no limitation of time within which amendments of this class must be made, although after the lapse of years the court should grant applications with great caution; and the granting of them rests in the sound discretion of the court, and not as a matter of right. To be entitled to amend, the party should show the fact of a mistake beyond a reasonable doubt.—*Scruggs v. Scruggs*, 272.

3. *Contracts—Private sale by sheriff, under order of County Court, invalid, and may be disproved by parol evidence.*—A sale of land by the sheriff, under order of a County Court, at private sale, is invalid; and it is immaterial that the order did not require a public sale. The sheriff is imperatively controlled by the requirements of the statute (*Wagn. Stat.* 867, § 3).

And when, in suit against a county for specific performance of the contract of sale, it appeared from the certificate of sale by the sheriff that the land was sold at public auction, the county is not conclusively bound by the said recitals, but may show by evidence that in fact such sale was a private one.—*Hutchinson v. Cassidy*, 431.

See **CONVEYANCES**, 13. **PARTITION**.

**SISTER STATES.**

See **EVIDENCE**, 8

**SLANDER.**

1. *Practice, civil—Actions—Slander—When material words charged are the same, other and immaterial words may differ.*—In an action for slander, if the words charged imputed to plaintiff the same indictable offense, the petition would not be held bad because immaterial words were slightly modified so as to meet the proof under the different shapes in which it might come.—*Pennington v. Meeks*, 217.
2. *Practice, civil—Actions—Slander—Different sets of words may be embraced in same count.*—In an action for slander, different sets of words



## SLANDER—(Continued.)

- spoken on different occasions may be set forth in the same count and be included in the same cause of action.—*Id.*
3. *Practice, civil—Actions—Slander—All the words charged need not be proved.*—In an action for slander, all the words charged need not be proved, either substantially or at all. It is sufficient to prove the identical words which of themselves constitute the slanderous imputation.—*Id.*
  4. *Practice, civil—Actions—Malice in law, definition of.*—Malice in law embraces an act wrongfully and intentionally done, without just cause or excuse, and does not necessarily imply malevolence of disposition or enmity toward any particular individual.—*Id.*
  5. *Practice, civil—Actions—Slander—Words held to be malicious in law, when.*—In an action of slander, words charging plaintiff with the crime of larceny were held to be malicious and slanderous of themselves, without regard to the question of intent; and if spoken as charged in the petition, the inference of malice would be a conclusion of law, and not of fact.—*Id.*
  6. *Practice, civil—Slander—Action for, need not state what.*—A petition in an action for slander is not fatally defective, under the present statute (2 Wagn. Stat. 1020, § 43), because it contains no allegation that the slanderous words were uttered in the presence of any one, or, being spoken in a foreign language, that they were understood by those present.—*Atwinger v. Fellner*, 276.
  7. *Practice, civil—Actions—Slander—Offense not being crime at common law, statute must be alleged, when.*—If an offense charged be a crime by the general law involving the punishment spoken of, the words are actionable without any allegation concerning the laws of the State or country where the offense is charged to have been committed; but it is otherwise where the act is not subject to criminal prosecution at common law, as in the case of arson. Accordingly, in suit for slander brought in this State, an allegation in the petition that defendant said of plaintiff, "he had to leave Indiana for burning a barn," without the further averment that, by the law of Indiana, burning a barn could be arson, would be fatally defective.—*Bundy v. Hart*, 460.
  8. *Practice, civil—Actions—Slander—Allegata and probata.*—In an action for slander, the words proved must be substantially the same words as those charged in the petition—not different words of the same import.—*Id.*

## SLAVES.

See CONTRACTS, 21.

## SPECIFIC PERFORMANCE.

See CONTRACTS, 10, 11.

## STAMPS.

See CONTRACTS, 2.

## STATUTE, CONSTRUCTION OF.

ADMINISTRATION, 1 (Wagn. Stat. 441, § 7).

ASSIGNMENTS, 1 (R. C. 1855, ch. 21, § 4).

ATTACHMENTS, 1 (Wagn. Stat. 185, § 19), 2 (Wagn. Stat. 190, § 42).

BOONVILLE, CITY OF, 1 (Sess. Acts 1838-9, p. 294; Sess. Acts 1868, p. 191).

CONVEYANCES, 2 (R. C. 1855, p. 363, § 37), 8 (Wagn. Stat. 1141, §§ 12, 13),

10 (Wagn. Stat. 274, § 9), 11 (Wagn. Stat. 277, §§ 24, 25), 12 (Wagn.

Stat. 595, § 35; *id.* 897, § 5), 13 (Wagn. Stat. 595, § 35).

## STATUTE, CONSTRUCTION OF—(Continued.)

- CORPORATIONS, 4 (Wagn. Stat. 1262, § 1).
- COURTS, COUNTY, 5 (Gen. Stat. 1865, ch. 137, § 7; *id.* ch. 136, § 2), 6 (Gen. Stat. 1865, ch. 127, § 1).
- CRIMES AND PUNISHMENTS, 1 (Wagn. Stat. 502, §§ 17, 18).
- ELECTIONS, 1 (Sess. Acts 1868, p. 136).
- EVIDENCE, 4 (Wagn. Stat. 528, § 30), 13 (Wagn. Stat. 1372, § 1).
- EXECUTION, 1 (Adj. Sess. Acts 1863, p. 20).
- FRAUDS, STATUTE OF, 2 (Wagn. Stat. 656, § 5).
- HUSBAND AND WIFE, 10 (Wagn. Stat. 911, § 21).
- JUDGMENTS, 4 (Wagn. Stat. 1137, §§ 14, 15; *id.* 1041, § 13), 5 (Sess. Acts 1861, p. 46; Sess. Acts 1863, p. 30).
- JUSTICES' COURTS, 1 (Wagn. Stat. 844, § 19), 2 (Wagn. Stat. 856, § 13), 3 (Wagn. Stat. 839, §§ 13, 14), 6 (Wagn. Stat. 196, § 77).
- LIMITATIONS, 5 (Sess. Acts 1847, p. 94, § 14; R. C. 1855, p. 1053, § 15; Gen. Stat. 1865, p. 747, § 14).
- LUNATIC ASYLUM, 1 (Sess. Acts 1870, p. 10).
- MANDAMUS, 2 (Adj. Sess. Acts 1857, p. 276).
- MECHANICS' LIENS, 1 (Wagn. Stat. 909, § 5), 3 (Wagn. Stat. 911, § 19), 4, 6, 7.
- PARTITION, 4 (Wagn. Stat. 970, § 31), 5 (Wagn. Stat. 975, § 63).
- PRACTICE, CIVIL—ACTIONS, 4 (Wagn. Stat. 1345, § 1).
- PRACTICE, CIVIL—APPEALS, 2 (Sess. Acts 1869, p. 16), 10 (Gen. Stat. 1865, 547, § 29), 14 (Wagn. Stat. 149, § 42; R. C. 1855, p. 252, § 47).
- PRACTICE, CIVIL—PLEADINGS, 5 (Gen. Stat. 1865, ch. 152, § 51), 8 (Wagn. Stat. 1022, § 52), 9 (Wagn. Stat. 1345, § 1).
- PRACTICE, CRIMINAL, 2 (Wagn. Stat. 1102, § 8), 7 (Wagn. Stat. 1097, § 19), 8 (Wagn. Stat. 1087, § 8), 12 (Wagn. Stat. 1106, § 30), 14 (Wagn. Stat. 1090, § 27).
- PRACTICE, SUPREME COURT, 10 (Wagn. Stat. 1114, § 16).
- PUBLIC PRINTER, 1 (Wagn. Stat. 1127, §§ 29, 30; Gen. Stat. 1865, ch. 20, § 30).
- QUO WARRANTO, 1 (Wagn. Stat. 1133, § 1).
- REVENUE, 5 (Wagn. Stat. 412, § 19-24).
- ST. LOUIS, CITY OF, 4 (Sess. Acts 1867, p. 63, § 19), 5 (Adj. Sess. Acts 1869, p. 383; Sess. Acts 1866, p. 296), 6 (Sess. Acts 1867, p. 67, § 18).
- SALES, 2 (Wagn. Stat. 791, § 14).
- SLANDER, 7 (Wagn. Stat. 1020, § 43).
- SURETY, 2 (Sess. Acts 1863, p. 76, § 49).
- TIME, COMPUTATION OF, 1 (Wagn. Stat. 888, § 6).
- WILLS, 1 (Wagn. Stat. 1371, § 49), 5 (Wagn. Stat. 1365, § 9), 6 (Wagn. Stat. 1366, § 11).

## STOCK.

See CORPORATIONS, 1, 2, 3.

## STOCKHOLDERS.

See CORPORATIONS, 2, 3.

## SUNDAY.

See TIME, COMPUTATION OF, 1.

## SURETY.

1. *Bills and notes maturing at different times—Deed of trust to secure, may be applied to notes last falling due.*—The holder of different notes secured by deed of trust may apply the entire proceeds of sale under the deed to the payment of those last maturing, and will not be prevented thereby, either in law or equity, from obtaining judgment against a surety on the note first falling due.—*Mathews v. Switzler*, 301.
2. *Revenue—State collector defaulting, sureties of—Money deposited by collector, recovered by surety in garnishment proceedings, will be held in trust for remaining sureties, when.*—After the debt due by a defaulting principal has been paid by his sureties, in ratable proportions, each of them becomes an independent creditor of the principal, and if any one should succeed in collecting his debt, the other creditors would have no claim whatever upon that fund.

But when the principal is a State collector the rule is different. The moment collections come into his hands they become the property of the State. Under the law (Sess. Acts 1863, p. 76, § 49) it becomes his duty to deposit them in the Bank of the State of Missouri; but his failure to do so would not operate to divest the State of its specific interest, and it might follow the fund, by suitable action, into any bank where deposited, and fasten upon the account created by it. Nor can the requirement of his official bond, with summary remedy upon default, be construed as divesting the title of the State to that fund. Such a deposit becomes a debt to the State, and none the less so because the collector might have discharged it by drawing out the money. And where the sureties on the collector's bond were compelled to pay out a liability on his part which this fund, if collected, would have gone to extinguish, it should, in equity, be transferred to such sureties.

Hence, if one of the sureties brings suit against the collector for the ratable share paid out by him, and recovers the sum by garnishment against the bank where the fund was deposited, on every principle the sum should be held by him as trustee for the use of all the sureties as the equitable owners, and no superior diligence on the part of the attaching surety could despoil the others. It is not as among equal judgment creditors, where the first levy gives the priority; for in that case there is no ownership, but only a lien, and the levy and sale become necessary to transfer the property. But the surety, in making contribution, will be entitled to deduct the costs and expense incurred by him in collecting the amount.—*Harrison v. Phillips*, 520.

3. *Principal and surety—Payment by surety—Extinguishment of obligation, to what extent—Subrogation.*—A surety who pays the debt of his principal is entitled to an assignment of the instrument paid. The payment of the obligation by the surety extinguishes it so far as the creditor is concerned, but not as to any rights which the surety has acquired by its payment. It should still subsist, with its liens and priorities, to enable him to recover of the principal as well as to compel contribution by the co-sureties, or to avail himself of any securities or collaterals turned out by the principal.

So, where an obligation turned out as collateral is paid, the original instrument, so far as the condition is concerned, is paid and extinguished; but it is still alive in favor of him who has paid it, and he should be permitted to avail himself of any rights in regard to it, to which its purchase would entitle him.—*Berthold, Adm'r of Sarpy, v. Berthold*, 557.

See **BILLS AND NOTES**, 8, 9.

**SURPRISE.**

See PRACTICE, CIVIL—TRIALS, 7.

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**TAVERN.**

See ST. LOUIS, CITY OF, 6.

**TAXES.**

See REVENUE.

**TIME, COMPUTATION OF.**

1. *'Practice, civil—New trial, motion for—Sunday never included in computing number of days.*—Under our statute a service of fifteen days before term, excluding Sundays, is not necessary to bring a party into court; but it is the well-settled rule of common law that, as to matters to be transacted in court, Sunday is *non dies*, and should not be counted. In moving for a new trial, or in arrest, a party should be entitled to four working days after trial if the term shall so long continue; and this rule is not annulled by the operation of the statute (Wagn. Stat. 888, § 6).—National Bank of the Metropolis v. Williams, 17.

**TOWNS.**

See CORPORATIONS, 4

**TRANSCRIPTS.**

See JUSTICES' COURTS, 4, 5. PRACTICE, CIVIL—APPEAL, 10.

**TRESPASS.**

See PRACTICE, CIVIL—ACTIONS, 5.

**TRUSTS AND TRUSTEES.**

1. *Trustee, larceny from, should appear as clearly as the case will admit of.*—Where a party standing in a fiduciary relation undertakes to discharge himself from responsibility for trust funds committed to his care, on the ground that such trust funds have been stolen from him, the fact of the loss, in the manner asserted, should be made to appear as clearly as the case will admit.—Foster v. Davis, 268.
2. *Equity—Purchase by trustee with money of cestui que trust—Action to divest title—Parol proof.*—A trust will ordinarily result in favor of one whose money is used by another in the purchase of land, where the conveyance is taken to himself instead of the person who furnished the money, and the facts which create the trust may be proved by parol; but such evidence must be clear and unequivocal, and not merely preponderating. There should be no room for reasonable doubt as to the facts relied upon.—Johnson v. Quarles, 423.

See HUSBAND AND WIFE, 5, 6, 7, 8. MORTGAGES AND DEEDS OF TRUST

**W**

**WARDS.**

See GUARDIAN AND WARD.

**WARRANTY.**

See AGENCY, 3. PRACTICE, CIVIL—PLEADINGS, 12.

## WILLS.

1. *Wills—Construction of—Partition.*—A testatrix, being seized of certain property, died, leaving six heirs. By the terms of her will the executors were empowered to sell and dispose of the whole estate, real, personal, and mixed, and to divide five-sixths of the proceeds equally among five of the heirs; but one portion was to be invested as they deemed best, and the proceeds paid to the sixth child, and at her death the investment was bequeathed to her heirs. In suit by the sixth child for partition of the property, *held*, that in accordance with the statute (2 Wagn. Stat. 1871, § 49), the plain intent of the testator should be made to govern, in disregard of technical rules, and that, under its provisions, plaintiff could not hold her share as tenant in common, but that the legal estate vested in the executors as donees to uses, in order to perform the duties intrusted to them by the will. Such being the law, plaintiffs would not be entitled to partition.—*Mead v. Jennings*, 91.
2. *Will, when prepared by devisee, looked on with suspicion—Presumption against its validity.*—Where one standing in relation of confidence to a testator who is old and *in extremis*, prepares a will in his own favor, the law regards the transaction with great suspicion. The clearest evidence is required that there was no fraud, influence, or mistake. The presumption is against the propriety of the transaction; and the *onus* of establishing the devise to have been voluntary and well understood rests on the party claiming; and this in addition to the evidence to be derived from the execution of the will conveying or devising the property.—*Harvey v. Sullens*, 147.
3. *Wills—Persons incapable of transacting ordinary business, incapable of making a will.*—*Semble*, that as a general rule, where deceased was, at the time of executing his will, old and infirm in body and feeble and childish in mind, and so incapable of transacting his ordinary business, he has not sufficient capacity to make a will.—*Id.*
4. *Wills—Undue influence.*—In suit to test the validity of a will, where the evidence shows that the will would not have been executed by deceased but for the influence exercised over his mind and will, the jury should find that the will was procured by undue influence, and was not his last will.—*Id.*
5. *Wills—Devise to stranger in blood, with no mention of children, a nullity.*—A will bequeathing the whole of testator's estate to an entire stranger in blood, without naming or in any wise mentioning or providing for the heirs, under the statute of wills (Wagn. Stat. 1865, § 9), is entirely void. The estate would descend to the heirs under the statute of descents and distributions, and the devisee would take nothing. The words used in the closing paragraph of section 9, *supra*, requiring "all the other heirs, devisees, and legatees to refund their proportional parts," did not give him an equal part with the other heirs. The devisees there referred to are heirs who would take a distributive share in the event that he died intestate. They have no application to a case of a stranger, where the whole will is a nullity.—*Burch v. Brown*, 441.
6. *Wills—Legacies—Devisees mentioned by classes—Children of devisees dead at date of will, entitled, how.*—A testator devised a certain remainder of his estate "to the sons and daughters of A." At the date of the will some were dead and some living. *Held*, that although the testator was partially aware of this fact, yet, inasmuch as their deaths were in no manner alluded to



## WILLS—(Continued.)

in the will, and they were therein regarded as alive, and as all the circumstances attending the making of that instrument showed its object to be that the children of those deceased should share his bounty, therefore, under the statute (Wagn. Stat. 1866, § 11), the children of A. who were living at the date of the will were not entitled to the whole of said residue as survivors, but the descendants of A.'s other children were entitled to the share which their ancestors, if living, would have taken.

The statute contemplates that where an estate is devised to children and relatives, if part of them are dead and part living, the children of those dead shall take the place of their deceased parents.

At common law the rule is different. Thus, if the property be given simply to the children of A., to be equally divided between them, the entire subject of the gift will vest in any child surviving the testator, without regard to previous deaths; and the rule is the same when the gift is to the children of a person actually dead at the date of the will.—*Jamison, Ex'r of Bell, v. Hay*, 546.

See ADMINISTRATION. COURTS, COUNTY, 5, 6.

## WITNESSES.

See EVIDENCE. PRACTICE, CIVIL—PLEADINGS, 15. PRACTICE, SUPREME COURT, 8.